No. 14,739

IN THE

United States Court of Appeals

For the Ninth Circuit

ROLLAND LINDSEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant was convicted after a jury trial in the District Court for the District of Alaska, First Division at Ketchikan, the Honorable George W. Folta presiding, of three counts of statutory rape (§65-4-12 ACLA 1949) and three counts of sodomy (§65-9-10 ACLA 1949) committed upon his adopted daughter. The Court sentenced appellant to a term of 12 years on each rape count and to a term of 10 years on each sodomy count, all the terms to run concurrently. Appellant filed notice of appeal from the judgment of

the District Court, and was duly admitted to bail pending appeal to this Court.

Jurisdiction below was based on 48 U.S.C. §101, and in this Court on 28 U.S.C. §1291.

STATEMENT OF FACTS.

The complaining witness, Loretta Lindsey, in early April, 1954, went to the U. S. Marshal's office and reported that her adopted father had been having sexual intercourse with her and had committed sodomous acts upon her for several years. At the time this complaint was made Loretta was 14 years old. Her adoptive mother, Victoria Lindsey, wife of appellant, is her aunt by blood, each having as a common relative Mrs. R. D. Pawsey, mother of Victoria and paternal grandmother of Loretta. Loretta had already told Mrs. Pawsey that appellant had been sexually abusing her, and Mrs. Pawsey had taken Loretta to live with her (R. 45). Shortly after the complaint was made a preliminary hearing was held and appellant was held to answer to the Grand Jury of the District Court. The Territorial Welfare Department arranged to have Loretta go to Wrangell, Alaska, to stay with the family of the then Deputy U. S. Marshal John Krepps. She remained there until August when she was sent back to the Welfare authorities in Ketchikan by Deputy Marshal Krepps (R. 39-42). Loretta stated that she had become lonely for the three Lindsey children and for Mrs. Victoria Lindsey (R. 39), that she insinuated to Mrs. Judy Krepps that she was preg-

nant in such a way as to give Mrs. Krepps reason to infer that her husband had intercourse with Loretta (R. 41), that the reason she made such an insinuation to Mrs. Krepps was to induce them to send her back to Ketchikan (R. 41), which in fact they promptly did (R. 41-42). The insinuation against Mr. Krepps was devoid of any details and was recanted by Loretta before she left Wrangell (R. 41). After arriving in Ketchikan, Loretta the day following about 9 o'clock in the morning went to the Lindsey home (R. 222) assuming that they had received 3 letters from her written in Wrangell (Defendant's Exhibit A) in which she had informed them of her intention to "drop the charges" against appellant. Loretta was rather coolly received by appellant (R. 42) and his wife (R. 222) until she told them of her desire to return to the family fold and to "drop the charges" (R. 42, 222-3). Appellant immediately called his attorney (R. 224) and in 25 or 30 minutes (R. 223) Loretta and appellant were in the law offices of Ziegler, Ziegler and Cloudy having a statement prepared retracting the prior accusations against appellant (R. 280-281), (Defendant's Exhibit B). This was August 25, 1954. On October 11, 1954, the Grand Jury returned a true bill charging appellant with 3 counts of rape, 3 counts of sodomy, and 1 count of endeavoring to influence a witness in the District Court (R. 3-5). On October 6, 7 and 8, 1954, a complete clinical psychiatric examination was made on Loretta by Dr. Charles L. Anderson, M.D., a duly qualified psychiatrist who was assisted by a clinical psychologist and a psychiatric social worker (R. 148, 374-401). Dr. Ander-

son had examined Loretta on April 28, 1954, shortly after she had complained to the federal authorities (R. 375). Dr. Anderson was fully aware that Loretta had retracted her charges against appellant (R. 402) and also that she had insinuated that Mr. Krepps had had intercourse with her (R. 404). Dr. Anderson gave Loretta a complete clinical examination, including batteries of psychological tests and a sodium pentothal interview (R. 374-401). He stated that, in his opinion, a sodium pentothal interview would be highly reliable when properly used on an immature patient (R. 381) and considering the whole case (R. 377). Dr. Anderson testified that it was his purpose to break down her story if possible (R. 382) but while under the influence of sodium pentothal she told essentially the same story she told him on April 28, 1954 (R. 382). The sodium pentothal interview was voluntarily taken by Loretta (R. 382). The evening before the interview, Dr. Anderson went to Loretta's home and explained to her that he wanted to give her a "truth serum" test in order to ascertain the truth. He told her she would not be able to tell a lie under the influence of this drug (R. 382). A magnetic recording was made of the interview, which was offered in evidence in order to give the jury and the court an idea of the facts upon which the expert witness based his opinion as to Loretta's credibility and mental normalcy (R. 380, 383) and also to rehabilitate the impeached witness by showing a statement consistent with her testimony made at a time when her ability to fabricate was inhibited by the influence of the drug

(R. 383). The court admitted the offered evidence on these grounds (R. 383) after having ruled specifically that evidence of this kind was not substantive evidence but merely rehabilitation of a witness (R. 379) impeached as a liar and a mental incompetent (R. 380). Instruction 8-A carefully explains to the jury that the statements of Loretta made while she was under the influence of sodium pentothal could be considered only if the jury found that she had been impeached and then only to sustain, rehabilitate and corroborate the impeached witness if in fact the jury determined that the drug-induced statements were sufficient to rebut and overcome the effect of the impeachment (R. 461-463). After a full clinical examination of the complaining witness, Dr. Anderson concluded that, in his opinion as a psychiatrist, Loretta Lindsey was not a fabricator or a liar (R. 400) was not a psychopath (R. 409) or mentally deranged (R. 381, 400) but was, considering the circumstances of her life, a normal girl of 15 years (R. 400) who could not have gained the information she related to him concerning appellant's sexual misconduct with her without having personally experienced these acts (R. 401, 408). Dr. Anderson explained the use of the sodium pentothal interview and its high standing in the field of psychiatry (R. 377). He explained that it was only a part of the evidence he used and upon which he based his expert opinion (R. 378). In addition he had batteries of psychological tests conducted upon her (R. 400) in addition to his three personal examinations (R. 374-382, 400). On cross-examination,

Dr. Anderson testified that he had given several sodium pentothal interviews each year since 1941 to patients young and old (R. 403) that his purpose in giving the interview was objective (R. 404) that he used sodium pentothal because it was most satisfactory in maintaining the subject in twilight zone between consciousness and semi-consciousness (R. 407, 413). Defense counsel were fully aware at the trial that Dr. Anderson's expert opinion was based on observation of Loretta's conduct in court, the psychological tests, his discussions with her and the sodium pentothal interview (R. 410). On cross-examination, defense counsel confined their probing to the sodium pentothal interview (R. 412). Dr. Anderson also testified that knowing of Loretta's insinuation of rape against Mr. Krepps would have a bearing on his evaluation of Loretta but that it didn't alter his opinion (R. 413), presumably his opinion favorable to her character, credibility and normality. The defense on rebuttal put Dr. Clarke, a young general practitioner, on the stand to testify that the use of the sodium pentothal interview was not generally accepted in the medical profession, in his opinion based on literature in the medical field (R. 427), and that it was not reliable in ascertaining truth or falsity (R. 429). On cross-examination Dr. Clarke reluctantly admitted that he had never conducted a sodium pentothal interview (R. 436), and that he was not a qualified expert on the subject of sodium pentothal interviews or their psychiatric value (R. 437-8, 440). The defense then rested, and after argument of

counsel the court instructed the jury. In instruction 8, the court stated the law of impeachment and pointed out that the impeachment of a witness does not necessarily mean that his testimony is completely deprived of value, and that the effect, if any, of the impeachment was for the jury to determine (R. 459). In instruction 8-A, the court explained rehabilitation of an impeached witness by statements made prior to the testimony on the stand consistent with that testimony and made at a time when the motive or ability to fabricate was reduced because of the influence of sodium pentothal (R. 461-2). The instruction points out that the jury first must decide whether the witness was impeached and then should consider whether she has been sustained or corroborated by the drug-induced statements (R. 462); and that the jury could believe the impeaching evidence or not, and could believe the rehabilitating evidence or not, only to determine the credibility of the witness and the weight, if any, to be accorded her testimony (R. 462-3). The trial court specifically cautioned the jury that the drug-induced statements of Loretta Lindsey were not substantive evidence that defendant committed any of the crimes charged (R. 463), and that these drug-induced statements would not have been admitted if Loretta had not been impeached as a witness (R. 463). On oral argument the Government in opening made a brief reference to the sodium pentothal interview as part of the examination made by Dr. Anderson upon which his expert opinion was based (R. 475-6). Defense counsel attacked the com-

plaining witness as a liar (R. 484, 496), cunning, deceitful and worldly-wise (R. 485), maladjusted (R. 490) and disoriented (R. 497). They argued the unreliability of the so-called truth-serum test (R. 487-8) and the unreliability of psychiatric testimony (R. 512-513). The closing argument of the Government emphasized that the sodium pentothal interview was not taken in a vacuum and that standing alone would not be overwhelmingly significant, but that the full psychiatric examination culminated in the psychiatrist's expert opinion that the complaining witness was mentally sound, was not a liar and could not have fabricated the testimony (R. 520). The jury returned a verdict of "guilty" on the 3 statutory rape counts and the 3 sodomy counts and a verdict of "not guilty" on the last count charging appellant with endeavoring to influence a witness.

ISSUES INVOLVED.

1. On Government rebuttal, is a recorded transcript of a sodium pentothal interview, conducted upon the complaining witness in a sex case by a qualified psychiatrist as part of a complete clinical examination, admissible to rebut testimony and inferences that the complaining witness is a pathological liar, a sex pervert and a mental case, where the recording was introduced for the purpose of presenting to the jury the facts relied upon by the expert witness in forming his opinion concerning the character, credibility, mental competency and sexual normalcy of the

impeached complaining witness in order to give the jury a sounder foundation for evaluating the opinion of the psychiatrist.

2. On Government rebuttal, is a recorded transcript of a sodium pentothal interview conducted as a part of a full clinical examination by a qualified psychiatrist admissible as a statement consistent with her testimony after her character has been attacked and her testimony impeached as a fabrication made as a result of hostility toward appellant, when the expert witness testified that such statements were made at a time when the ability of a young girl to fabricate was greatly inhibited by the influence of the drug, if not made impossible, and when the contents of the interview contained such a mass of complicated detail concerning intimate sexual matters that fabrication by such a young witness was highly improbable.

3. Under Alaska law, does the amount of corroboration of a rape complainant rest in sound discretion of the trial court, assuming arguendo that corroboration beyond proof of *corpus delicti* is required at all; and, if so, did the trial court abuse its discretion inasmuch as the facts adduced would satisfy the corroboration requirements of the great majority of jurisdictions in the United States where some corroboration of a rape complainant is required either by statute or by judicial decision; and where defendant-appellant did not object at the trial.

4. Does the record show prejudicial misconduct by the United States Attorney in attempting to show a prior act of sexual misconduct on the part of ap-

pellant on the Government's direct case as proof of design, pattern, motive and intent, and in cross-examination to impeach the appellant by questioning him about this specific immoral act, where the trial court sustained appellant's objections in its sound discretion even though there was authority for admission of such evidence in the discretion of the trial court; and when defendant-appellant made no objection at the trial.

5. Did the trial court commit reversible error in stating that he would reserve ruling on the admissibility of the complaining witness' retraction statement in view of the parental relation existing between appellant and the complaining witness, and in view of testimony indicating the possibility that there was, solely by reason of this relationship and circumstances surrounding the return of complaining witness to the family fold, a subtle, but implied, coercion of the complaining witness in making the retraction, when the trial court specifically and emphatically stated that there was no implication in his ruling of actual coercion; where the retraction statement was admitted in evidence as an Exhibit on appellant's direct case; where the complaining witness on her direct testimony and cross-examination freely admitted making the retraction of the charges against appellant, which by the prevailing practice would preclude appellant from again proving the inconsistent statement on his direct case by another witness, and when the trial court's statements and rulings were not objected to at the trial.

6. Did the trial court commit reversible error in striking the so-called bad character testimony introduced by appellant when the record clearly shows that none of the witnesses were qualified to give testimony concerning reputation of the complaining witness for truth and veracity, and when admission of character evidence lies in the sound discretion of the trial court, and especially when no objection was made at the trial.

7. Did the trial court commit reversible error in limiting testimony concerning hostility against appellant to a period of thirty days prior to the making of the charges involved in this case where the record clearly shows that appellant admitted that the hostility of the complaining witness derived from acts of parental discipline only and where appellant admitted that such hostility was not continual but rather short-lived and a natural child-like reaction to family discipline; and when defendant-appellant did not object to this ruling at the trial.

8. Did the trial court commit reversible error in sustaining the Government's objection to testimony of appellant to the effect that there was a feeling of hostility by the complaining witness toward Victoria Lindsey, aunt by blood and adoptive mother of the complaining witness and wife of appellant, when such testimony was objected to as irrelevant and immaterial, when the record shows that the complaining witness several times proclaimed great affection for Victoria, where Victoria had already testified on the stand and gave no indication of hostility between her and the

complaining witness, and especially where no objection was made to this ruling at the trial.

SUMMARY OF ARGUMENT.

I.

The trial court did not err in permitting Dr. Anderson to predicate his expert opinion concerning the character and credibility of Loretta Lindsey in part upon the results of a sodium pentothal interview (a) because a sodium pentothal interview is a reliable auxiliary procedure in connection with a full clinical examination by a psychiatrist especially where the subject is immature; (b) because in a case involving statutory rape and sodomy with the consent of the child victim there should be such psychiatric corroboration of the complaining witness admissible in evidence as such in the interest of complete justice to both the accused and to society; and (c) because the jury was entitled to have this data presented to them in order to evaluate the weight, if any, to be accorded to the expert opinion concerning Loretta's credibility, sanity and sexual normality.

II.

The trial court did not err in admitting the statement of Loretta Lindsey made while under the influence of sodium pentothal, as a prior consistent statement given under circumstances which precluded or made highly improbable the operation of the motive to fabricate, when a prior inconsistent statement had

been introduced and her credibility attacked by imputations that her story was a recent contrivance and the result of hostility toward the defendant, and its admission was not an abuse of that discretion accorded the trial court in this area.

A. Since there is a split of authority on whether or not a prior inconsistent statement throws open the door to prior consistent statements, and since the question has never been determined in this jurisdiction, the trial court was at liberty to select the rule that it considered most conducive to a fair and just trial.

B. Even those Courts, which hold that impeachment by a prior inconsistent statement is not in itself sufficient cause to allow the introduction of a prior consistent statement, recognize the well established exception that the prior consistent statement may be admitted when the witness sought to be impeached has been accused of hostility or of making a recent fabrication.

C. Although the consistent statement was not technically "prior" to the inconsistent statement nor to the time of bringing the charges it was made under circumstances which afforded a safeguard long recognized in the admission of hearsay evidence, i.e., the destruction of utter lack of the ability or motive to fabricate.

D. The admission of the prior consistent statement to rehabilitate Loretta Lindsey after she had been impeached by charges that she was hostile to

the defendant and a pathological liar was in the sound discretion of the trial court.

III.

Alaska follows the common-law rule that corroboration of the complaining witness in a rape case is not required, but even assuming such a requirement the Government has introduced sufficient corroboration evidence to satisfy the standards of jurisdictions in which corroboration is required.

IV.

In view of the defendant's admission that the "hostility" of the complaining witness was generated only by acts of parental discipline and was not of a continuing nature, it was not reversible error for the trial court in its sound discretion to limit the showing of hostility to a period of 30 days prior to the initiation of the charges.

V.

The trial court did not commit reversible error in striking the bad character testimony when, as the record clearly shows, the character witnesses were not properly qualified to give testimony as to Loretta Lindsey's reputation in the community for truth and veracity.

VI.

It was not prejudicial misconduct on the part of the United States attorney to attempt to show a similar offense with another young girl as evidence

of a common criminal design or lustful disposition, nor was it improper to seek to impeach the defendant by questioning him about this prior immoral act, where the trial court sustained defendant's objections and where the introduction of this evidence for either purpose is recognized in many jurisdictions.

VII.

The trial court's comments at the time of reserving for later decision the question of the admissibility of the retraction statement, did not constitute reversible error when viewed in the light of the facts as then disclosed, and the court's clear explanation of its position; particularly when the retraction statement was later admitted in evidence as Defendant's Exhibit "B".

VIII.

The trial court did not err in excluding testimony of appellant that there was a feeling of hostility by Loretta Lindsey toward Victoria Lindsey, aunt by blood and adoptive mother of Loretta and wife of appellant, when there was no foundation laid for such impeachment and when the record clearly shows that no hostility did in fact exist.

ARGUMENT I.

THE TRIAL COURT DID NOT ERR IN PERMITTING DR. ANDERSON TO PREDICATE HIS EXPERT OPINION CONCERNING THE CHARACTER AND CREDIBILITY OF LORETTA LINDSEY IN PART UPON THE RESULTS OF A SODIUM PENTOTHAL INTERVIEW (a) BECAUSE A SODIUM PENTOTHAL INTERVIEW IS A RELIABLE AUXILIARY PROCEDURE IN CONNECTION WITH A FULL CLINICAL EXAMINATION BY A PSYCHIATRIST ESPECIALLY WHERE THE SUBJECT IS IMMATURE; (b) BECAUSE IN A CASE INVOLVING STATUTORY RAPE AND SODOMY WITH THE CONSENT OF THE CHILD VICTIM THERE SHOULD BE SUCH PSYCHIATRIC CORROBORATION OF THE COMPLAINING WITNESS ADMISSIBLE IN EVIDENCE AS SUCH IN THE INTEREST OF COMPLETE JUSTICE TO BOTH THE ACCUSED AND TO SOCIETY; AND (c) BECAUSE THE JURY WAS ENTITLED TO HAVE THIS DATA PRESENTED TO THEM IN ORDER TO EVALUATE THE WEIGHT, IF ANY, TO BE ACCORDED TO THE EXPERT OPINION CONCERNING LORETTA'S CREDIBILITY, SANITY AND SEXUAL NORMALITY.

Appellant's main argument appears to be that the trial court erred in admitting Dr. Anderson's testimony concerning the results of a sodium pentothal interview conducted with Loretta Lindsey and in admitting a recorded transcript of statements made by Loretta while she was under the influence of the drug. At the trial, defendant objected to such admission on the ground of unreliability (R. 375), referring apparently to the opinion in *State v. Lindemuth,* 243 P. 2d 325 (N.M. 1952) (R. 379), and lack of precedent (R. 383). The trial court ruled that the evidence was admissible, not as substantive evidence (R. 379), but merely to sustain and corroborate the witness (R. 380, 384). The Government also urged admission of this evidence to rebut charges that Loretta Lindsey was a psychopathic liar and a mentally

deranged girl (R. 380); and that the recording was offered to give the jury and the Court an idea of the test that was used by Dr. Anderson as part of his clinical examination of Loretta in order to furnish a firmer foundation for evaluating the expert's opinion (R. 383). The trial court, in ruling in favor of admissibility, pointed out that the facts and circumstances of this case justified the Court in availing itself of scientific evidence (R. 383, 384). The expert confined his opinion to an evaluation of Loretta's character and credibility based upon a full clinical examination (R. 400-401). He gave no substantive evidence on the ultimate issues in the case viz., the guilt or innocence of appellant. He stated that, in his opinion, Loretta was not a fabricator or a liar, that she was not mentally deranged and that it was inconceivable to him that Loretta could have gained her intimate knowledge of sexual matters except from personal experience (R. 400-401). On cross-examination, he stated that it was his opinion that Loretta could not have fabricated such a complicated story dealing with sexual matters (R. 408), and that in his opinion Loretta was not a psychopath (R. 409).

The arguments urged by appellant (Appellant's Argument I) are not sound in principle and are not supported by his cited authorities. See Appendix "E", *infra,* for appellee's authorities on this point.

In support of the ruling of the trial court appellee has examined every pertinent authority which has considered the question of the admissibility of the results of narcoanalysis, here a sodium pentothal in-

terview. These authorities are analyzed by topical paragraphs in appellee's Appendix "D", *infra*. Since, so far as appellee knows, the precise issue posed by this appeal has not been authoritatively ruled upon in any jurisdiction, it is important to observe that the trend of the law is clearly in favor of the admissibility of psychiatric expert testimony, especially in sex cases, and in favor of presenting to the jury the data used by the psychiatrist in arriving at his expert opinion, including the results of narcoanalysis. *People v. Jones*, 266 P. 2d 38 (Sup. Ct. Cal. 1954); *People v. Ford,* 107 N.E. 2d 595 (N.Y. 1952) (dissent, no majority opinion); and see *U. S. v. Hiss,* 88 F. Sup. 559 (S.D.N.Y. 1950); *People v. Esposito,* 39 N.E. 2d 925 (N.Y. 1942); *People v. McNichol*, 224 P. 2d 21 (Cal. App. 1950); 3 Wigmore, *Evidence* (3d ed. 1940) §§ 466, 924(a), 934(a); 2 Wigmore, *id.,* 2265; C. T. McCormick, *Handbook of Law of Evidence,* West Pub. Co. (1954), § 45, p. 99, § 175, pp. 373-375 (Appendix "C", *infra*); *Psychiatric Aid in Evaluating the Credibility of Rape Complainant,* 26 Ind. L.J. 98 (1950) (Appendix "A", *infra*); Dession, Freedman, Donnelly and Redlich, *Drug-Induced Revelation,* 62 Yale L.J. 315, 320-1, 327-8, 338-342 (1953) (Appendix "B", *infra*).

The cases which have considered the admissibility of the results of narcoanalysis are not directly in point with the case at bar. For the most part, drug-induced statements have been offered in evidence by defendants in criminal cases as substantive evidence of their innocence. *State v. Hudson,* 289 S.W. 920

(Mo. 1926); *State v. Pusch,* 46 N.W. 2d 508 (N.D. 1950); *Orange v. Comm.,* 61 S.E. 2d 267 (Va. 1950); *State v. Lindemuth,* 243 P. 2d 325 (N.M. 1952); *U. S. v. Bourchier,* 5 U.S.C.M.A. 15, 17 C.M.R. 15, 20-24 (Ct. of Mil. App. 1954). In a recent case, *People v. Jones,* 266 P. 2d 38 (Sup. Ct. Cal. 1954), the Supreme Court of California ruled that it was reversible error to exclude testimony by a psychiatrist, based in part upon the result of a sodium pentothal interview, that in his opinion the defendant "was not a sexual deviate and was incapable of having the necessary intent to be lustive, either for himself or to satisfy the lusts of a child of nine and one-half years of age". It is submitted that the *Jones* case goes much farther than the trial court did in the case at bar. The Supreme Court held the proffered evidence was admissible as tending to show the good character of defendant for morality. The Court distinguished *People v. Cullen,* 234 P. 2d 1 and *People v. McCracken,* 246 P. 2d 913, on the ground that in those cases the drug-induced statements of defendants were sought to be introduced for the purpose of proving the matter asserted whereas Jones' statements were merely data used by the psychiatrist in forming his opinion.

In sex cases, especially those in which the victim is a child who has consented to the sexual acts as in the *Jones* case and the case at bar, the Courts have shown a greater liberality in the admission of psychiatric testimony. In these consent-under-age sex cases it is always advisable to have the complaining witness undergo a full clinical psychiatric examina-

tion for the protection of the defendant as well as to vindicate a social and moral outrage. Indeed, Professor Wigmore says it is the imperative duty of the prosecutor to have the complainant thoroughly examined by a psychiatrist. 3 Wigmore, *Evidence* (3d ed. 1940) § 934 (a). The American Bar Association Committee on the Improvement of the Law of Evidence (1937-1938) by a vote of 47 to 2 recommended that in all sex cases the complainant should be examined physically and mentally. 3 Wigmore, *id.,* § 924(a). Professor McCormick urges such examinations as being justified by the present wide acceptance of psychiatric testimony, especially in sex cases. McCormick, *op. cit. supra* (1954), § 45, p. 99.

The record clearly shows that Loretta Lindsey was fully examined by Dr. Anderson (R. 374-385) and that she was given a battery of psychological tests (R. 378) in addition to the sodium pentothal interview. Dr. Anderson specifically testified that the sodium pentothal interview was not relied upon solely by him in forming his opinion of her character and credibility (R. 378, 400). Dr. Anderson testified that he watched Loretta closely during the four-day trial and that, in his opinion, her behavior and demeanor helped in forming his opinion of her (R. 380-381). He also stated that, in his opinion, the sodium pentothal interview is a more reliable auxiliary procedure when used with an immature subject (R. 381).

In *U. S. v. Hiss,* 88 F. Supp. 559 (S.D.N.Y. 1950), a psychiatrist was permitted to testify concerning his expert opinion of the character and credibility of a

witness he had only observed in the courtroom. The psychiatrist was permitted to state his opinion that the witness was a psychopathic personality and not worthy of belief. It is submitted that the *Hiss* case goes much farther in admitting psychiatric testimony than the trial court did in the instant case. Yet the *Hiss* case stands as good authority for doing what was done here. Appellee believes that a full clinical examination should be made of the witness to be impeached or rehabilitated, but perhaps the absence of such a firm foundation goes more to the weight than to the admissibility of such expert psychiatric testimony. 3 Wigmore, *Evidence* (3d ed. 1940) §§ 977 et seq., 2 Wigmore, *id.*, § 680.

The value of psychiatric testimony in sex cases involving young victims who have consented to the sexual acts cannot be denied. But appellant contends that the basis of the expert psychiatric opinion concerning character and credibility of an impeached complaining witness should not be admitted because sodium pentothal interviewing is an unreliable technique and no Appellate Court has approved the admission of such results. The *obiter dictum* in *State v. Lindemuth,* 243 P. 2d 325 (N.M. 1952) is certainly no authority for either argument. Other Courts apparently do not agree that narcoanalysis is unreliable because the results would have been admissible in evidence if the parties had so stipulated. *Orange v. Comm.,* 61 S.E. 2d 267 (Va. 1950); *People v. Houser,* 193 P. 2d 937 (Cal. App. 1948); *State v. Lowry,* 185 P. 2d 147 (Kans. 1947); *LeFevre v. State,* 8 N.W. 2d

288 (Wisc. 1943). In *Peo. v. Jones,* 266 P. 2d 38 (1954), the Supreme Court of California held the results of narcoanalysis admissible without stipulation.

Another basis for the admissibility of the drug-induced statements of Loretta Lindsey is well stated in the dissenting opinion of Judge Desmond in *People v. Ford,* 107 N.E. 2d 595 (N.Y. 1952). There was no majority opinion so it is impossible to know the precise basis for their decision. Judge Desmond's dissent, however, shows the careful research made of the question of admissibility of drug-induced statements as facts upon which the expert opinion of the psychiatrist is based. Since the opinion of the psychiatrist is acceptable and admissible in evidence it is essential that the jury should be informed of the facts upon which the expert based his conclusions in order to determine whether they are well founded [citing cases]. Judge Desmond carefully distinguished the lie detector cases as not being in point. Some of the Courts treat narcoanalysis and mechanical lie detection as though they were the same. Appellee contends that the question of admissibility of the results of mechanical lie detectors is not the same as the question of the admissibility of drug-induced statements made as part of a full clinical psychiatric examination.

It is submitted that the jury in the case at bar was entitled to know the demonstrable facts upon which Dr. Anderson's expert opinion concerning Loretta's character and credibility were based. *People v. Ford,*

107 N.E. 2d 925 (N.Y. 1942); and see authorities collected in Appendix "D" *infra,* para. 27.

So far as the argument that the magnetic recording of Loretta's drug-induced statements was inadmissible, appellee contends that the overwhelming weight of authority upholds the admissibility of properly identified magnetic recordings. *State v. Spencer,* 258 P. 2d 1147, 1152 (Sup. Ct. Ida. 1953); *People v. Stephens,* 256 P. 2d 1033 (Cal. App. 1953); *Ray v. State,* 57 So. 2d 469 (Miss. 1952); *State v. Perkins,* 198 S.W. 2d 704, 168 A.L.R. 920 (Mo. 1946); Anno. 168 A.L.R. 927; *Williams v. State,* 226 P. 2d 989, 994 (Okla. Crim. 1951); *Wright v. State,* 79 So. 2d 66 (Ala. 1955).

Appellee further contends that narcoanalysis is analogous to blood tests and medical examinations generally, the results of which are not offered for testimonial purposes. 8 Wigmore, *Evidence* (3d ed. 1940) § 2265. This alone is a sufficient reply to appellant's arguments that the admission of Loretta's drug-induced statements violated the hearsay rule and deprived appellant of his right to be confronted by the witnesses against him. Appellant's authorities are collected and analyzed in Appendix "E", *infra.* Appellee contends that none of appellant's authorities support his contentions because Loretta's drug-induced statements were not offered testimonially but only as clinical data used by the expert in arriving at his opinion of her character and credibility. The hearsay rule has no application to this situation.

People v. Jones, 266 P. 2d 38 (Cal. 1954); 8 Wigmore, *op. cit. supra,* § 2265. Moreover, appellant admits, as he has to, that nothing came in by way of Loretta's drug-induced statements that had not already been brought out on appellant and appellee's cases in chief. Indeed, considering the drug-induced statements as being consistent with and prior to her direct testimony it can hardly be denied that in order to sustain and rehabilitate an impeached witness it is logically necessary that there be no important discrepancies. Appellant's authorities in support of his inadmissible hearsay and deprivation of right of confrontation arguments do not support either argument. *Curtis v. Rives,* 123 F. 2d 936 (D.C. Cir. 1941); and *U. S. v. Douglas,* 155 F. 2d 894 (7th Cir. 1946). See Appendix "E", *infra.* It requires no citation of authorities to uphold the well-accepted rule that introduction of prior inconsistent statements to impeach and of prior consistent statements to rehabilitate does not result in a deprivation of the right of a defendant to be confronted with adverse witnesses and that the hearsay rule has no application because neither type of statement is offered testimonially to prove the truth of the facts asserted.

Appellant's assertion of error in Instruction 8-A is based upon the objection below that it was predicated upon inadmissible evidence, viz. the results of a sodium pentothal interview. On appeal, appellant now urges that the magnetic recording did not constitute a previous consistent statement and that instruction 8-A misled the jury on the matter of im-

peachment. Appellee strongly contends that it is patently unfair to a trial judge to rely upon an objection at the trial and then assert entirely different grounds for error on an appeal. Rule 30, F.R.Cr.P., clearly is intended to protect a trial judge from such unfairness. Appellee contends that Rule 30 precludes appellant from relying on anything except the inadmissible evidence objection.

Moreover, appellee contends that instruction 8-A correctly states the law of impeachment, and that the jury was not therefore misled.

Instruction 8-A is a good and proper instruction, and by the practice prevailing in the Federal Courts under the Rules of Criminal Procedure, 18 U.S.C., Courts of Appeal no longer take a strained and hypercritical view in passing on alleged error in instructions. *Patterson v. U. S.*, 192 F. 2d 631 (5th Cir. 1951), *cert. den.* 343 U.S. 951.

Appellee contends that the interests of complete justice will be best promoted and satisfied by giving the trial court a a wide area of discretion in the conduct of the trial and the admission of evidence. In the areas of psychiatric testimony, character evidence and evidence of prior inconsistent and prior consistent statements, the trend is definitely toward greater liberality in their admission. *U. S. v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950); *People v. Jones*, 266 P. 2d 38 (Cal. 1954); *Michelson v. U. S.*, 335 U.S. 469 (1948); *Di Carlo v. U. S.*, 6 F. 2d 364 (2d Cir. 1925); *Affronti v. U. S.*, 145 F. 2d 3 (8th Cir. 1944).

As Judge Hand recently emphasized in *U. S. v. Petrone,* 185 F. 2d 334 (2d Cir. 1950), it is (p. 336):

> . . . the inveterate habit in American courts of treating rules of evidence as though they were sacred tables, that it is apparently impossible to substitute the view that they should be lightly held as wise admonitions for the general conduct of the trial.

The trial court's ruling in favor of admissibility was wise, under the circumstances of this case, and was in accordance with enlightened justice. There was no abuse of discretion and appellee respectfully submits that the ruling below should be affirmed.

ARGUMENT II.

THE TRIAL COURT DID NOT ERR IN ADMITTING THE STATEMENT OF LORETTA LINDSEY MADE WHILE UNDER THE INFLUENCE OF SODIUM PENTOTHAL, AS A PRIOR CONSISTENT STATEMENT GIVEN UNDER CIRCUMSTANCES WHICH PRECLUDED OR MADE HIGHLY IMPROBABLE THE OPERATION OF THE MOTIVE TO FABRICATE, WHEN A PRIOR INCONSISTENT STATEMENT HAD BEEN INTRODUCED AND HER CREDIBILITY ATTACKED BY IMPUTATIONS THAT HER STORY WAS A RECENT CONTRIVANCE AND THE RESULT OF HOSTILITY TOWARD THE DEFENDANT AND ITS ADMISSION WAS NOT AN ABUSE OF THAT DISCRETION ACCORDED THE TRIAL COURT IN THIS AREA.

A. SINCE THERE IS A SPLIT OF AUTHORITY ON WHETHER OR NOT A PRIOR INCONSISTENT STATEMENT THROWS OPEN THE DOOR TO PRIOR CONSISTENT STATEMENTS, AND SINCE THE QUESTION HAS NEVER BEEN DETERMINED IN THIS JURISDICTION, THE TRIAL COURT WAS AT LIBERTY TO SELECT THE RULE THAT IT CONSIDERED MOST CONDUCIVE TO A FAIR AND JUST TRIAL.

B. EVEN THOSE COURTS, WHICH HOLD THAT IMPEACHMENT BY A PRIOR INCONSISTENT STATEMENT IS NOT

IN ITSELF SUFFICIENT CAUSE TO ALLOW THE INTRODUCTION OF A PRIOR CONSISTENT STATEMENT, RECOGNIZE THE WELL ESTABLISHED EXCEPTION THAT THE PRIOR CONSISTENT STATEMENT MAY BE ADMITTED WHEN THE WITNESS SOUGHT TO BE IMPEACHED HAS BEEN ACCUSED OF HOSTILITY OR OF MAKING A RECENT FABRICATION.

C. ALTHOUGH THE CONSISTENT STATEMENT WAS NOT TECHNICALLY "PRIOR" TO THE INCONSISTENT STATEMENT NOR TO THE TIME OF BRINGING THE CHARGES IT WAS MADE UNDER CIRCUMSTANCES WHICH AFFORDED A SAFEGUARD LONG RECOGNIZED IN THE ADMISSION OF HEARSAY EVIDENCE, i.e., THE DESTRUCTION OF UTTER LACK OF THE [redacted]ABILITY OR MOTIVE TO FABRICATE.

D. THE ADMISSION OF THE PRIOR CONSISTENT STATEMENT TO REHABILITATE LORETTA LINDSEY AFTER SHE HAD BEEN IMPEACHED BY CHARGES THAT SHE WAS HOSTILE TO THE DEFENDANT AND A PATHOLOGICAL LIAR WAS IN THE SOUND DISCRETION OF THE TRIAL COURT.

Diligent search has revealed no Alaskan cases treating the question of the admissibility of prior consistent statements. Other jurisdictions have ruled both ways on whether the mere introduction of a prior inconsistent statement permits the admission of a prior consistent case to rehabilitate the impeached witness. McCormick, *Evidence* 108, § 49:

> There is much division of opinion on the question whether impeachment by inconsistent statement opens the door to support by proving consistent statements.

Discussed in 140 A.L.R. 49, 59 and 4 Wigmore, *Evidence,* (3d ed.) p. 197, § 1126.

Conceding that the majority view favors inadmissibility still the question was unsettled in Alaska and

the trial judge was free to select the rule which he considered most consonant with requirements of a fair and just trial.

But even those Courts following the majority view, holding that a prior inconsistent statement standing alone is not enough, will admit a prior consistent statement where the witness sought to be impeached has been charged with hostility or making a recent fabrication. (4 Wigmore, *Evidence,* (3d ed.) 203, § 1128 and 4 Wigmore, *id.,* 205, § 1129; *People v. Singer,* 89 N.E. 2d 710, (N.Y. 1949); 140 A.L.R. 21, 93-128. The federal Courts also recognize these well established exceptions to the rule that a prior consistent statement is inadmissible. *Di Carlo v. United States,* 6 F. 2d 364, 366 (2d Cir. 1925), *Cert. den.,* 268 U.S. 206:

> It is well settled that, when the veracity of a witness is subject to challenge because of a motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose. The common sense of such a rule has been too strong for the formal objection that the evidence is hearsay, and indeed the objection is in substance not good anyway, since the witness is by hypothesis there to be cross-examined. . . .
>
> His declarations, of which the identifications in the police station were only a part were therefore admissible under the established rule, if made under circumstances which precluded or made improbable the operation of the motive through which his testimony might be impeached.

In *Dowdy v. United States,* 46 F. 2d 417 (4th Cir. 1931), cited by appellant, the decision was reversed not because a prior consistent statement had been introduced, but because a motive to fabricate existed at the time of making the prior consistent statement. The Circuit Court then went on to lay down the requirements for the admission of prior consistent statements (p. 424):

> But in order to bring the case within the rule, it must appear that the conversation occurred soon after the transaction, is consistent with the statements made under oath, was made before any motive to fabricate could exist, and contains such fact or facts pertinent to the issues involved as reasonably furnish to the jury some test of the witness' integrity and accuracy of recollection; and such evidence should never be admitted until the witness has been in some way impeached; and the jury should be carefully cautioned that the evidence is to be considered only as affecting the credibility of the witness; and it should never be admitted as substantive or independent supporting testimony.

The case of *United States v. Sherman,* 171 F. 2d 619 (2d Cir. 1948), is also cited by appellant in support of the proposition that the federal Courts follow an inflexible rule rejecting all prior consistent statements used to rehabilitate an impeached witness. Although Judge Hand's language in that case is somewhat ambiguous, a close inspection of the case will show that the statement was excluded because the witness had a motive to fabricate when it was made and the *Di*

Carlo case was cited in support of its inadmissibility. The significant language is found on page 622:

> Concededly the second statement was not competent unless the admission of the impeaching statement made it so, for when Oliva made it he had the same motive to fabricate—the hope of lenity—that he had while on the stand. [Citing the *Di Carlo* case.] (*Di Carlo v. U. S., supra.*)

All the Court is saying here is that Oliva's consistent statement is inadmissible because made when he had a motive to fabricate, and the fact that an inconsistent statement was shown did not make inadmissible evidence, admissible. Obviously no departure from the *Di Carlo* case was intended because it was cited in support of the Court's position. The dictum relied upon by appellant found on page 622, "The reason for its exclusion is because it has not been made on oath rather than because it had no probative value", refers only to the basic rule holding consistent statements inadmissible and was not meant to include the exceptions to this rule based on hostility and recent fabrication. To accept this dictum blindly would be to wipe out all the recognized hearsay exceptions and that was certainly not Judge Hand's intent.

Thus, it is well recognized by the authorities, and the federal cases are in accord, that where evidence has been introduced to show a witness' hostility or where either expressly or by implication her story is assailed as a recent fabrication a prior consistent statement may be admitted.

In the present case the entire defense was posited upon the ground that because of Loretta's hostility toward her father she made up this saga of carnal abuse (R. 87, 92, 94, 247-268). Defense counsel also implied that her testimony concerning the sodomous acts was a recent contrivance (R. 85).

Since the defense had sought to impeach Loretta Lindsey with a prior inconsistent statement, with evidence of her hostility toward defendant, and by implications that part of her story was a recent fabrication, the Government was then at liberty to introduce a prior consistent statement to rehabilitate her.

The sequence of events leading up to the trial was as follows: the charges were made, a preliminary hearing was held, the retraction statement was made, the consistent statement was made under sodium pentothal, and finally the trial. What is meant by the term "prior" is that the statement be made prior to the time when the witness possessed a motive to fabricate. It is not necessary that the consistent statement antedate the inconsistent statement. Wigmore, *Evidence,* 202 § 1126:

> . . . It is sometimes said, by Courts admitting consistent statements, that they must have been uttered before the self-contradiction; though this seems an unnecessary refinement.

What is important is the lack or absence of a motive to fabricate. It is submitted that the story elicited under sodium pentothal satisfies this safeguard. The

interview was the culmination of a battery of psychological tests given to determine the veracity of the prosecutrix's story. A properly qualified expert testified that on the basis of the tests he had given, and considering the girl's age and personality make-up, he was convinced she was telling the truth when under the influence of sodium pentothal (R. 402). It is the opinion of the appellee that a statement obtained under these conditions and as part of a series of psychological tests, is the most reliable type of consistent statement possible to obtain. A noted authority on evidence concurs in this view. McCormick, *Evidence,* 374 § 175:

> . . . If, however, a foundation should be laid by evidence of experts as to the validity of the method and as to its correct application in the particular instance so that in the opinion of the experts the power of conscious contriving was removed and the statements were not actuated by fantasy or suggestion—ever present dangers here—such statements under voluntary narcosis could reasonably be admitted. Even when offered by the party on his own behalf, the "hearsay" or "self-serving" objection need not prevail. *If the offering party has testified, the statement may be offered, not to prove the facts stated therein, but as a prior consistent statement to support his credibility,* escaping the rule against such form of support by reason of the foundation showing the unique trustworthiness of this type of prior statement. (Emphasis supplied.)

Finally the admission of a prior consistent statement to rehabilitate an impeached witness is in the

sound discretion of the Court, and should not warrant a reversal except on a showing of clear abuse. In *Beaty v. U. S.,* 203 F. 2d 652, 656, (4th Cir. 1953) the Court after holding that the prior consistent statement was properly admitted went on to say:

> . . . To what extent they should be admitted for purposes of corroboration is a matter resting largely in the discretion of the trial judge and we do not think that the admission of the evidence here constituted an abuse of discretion or furnishes any ground for awarding a new trial.

To the same effect see *Affronti v. U. S.,* 145 U.S. 3, 8 (8th Cir. 1944).

In view of careful psychological testing leading up to the sodium pentothal interview, and the expert's testimony to its efficacy on this particular witness, it was not an abuse of the trial court's discretion in this area to admit the recording of the sodium pentothal interview.

ARGUMENT III.

ALASKA FOLLOWS THE COMMON-LAW RULE THAT CORROBORATION OF THE COMPLAINING WITNESS IN A RAPE CASE IS NOT REQUIRED, BUT EVEN ASSUMING SUCH A REQUIREMENT THE GOVERNMENT HAS INTRODUCED SUFFICIENT CORROBORATION EVIDENCE TO SATISFY THE STANDARDS OF JURISDICTIONS IN WHICH CORROBORATION IS REQUIRED.

Although appellant did not raise this objection at the trial and did not request a judgment of acquittal or a new trial, he now asserts that the testimony of Loretta lacks sufficient corroboration to uphold the

conviction on appeal (Appellant's Argument III). This afterthought is called "plain error" by appellant (Appellant's Brief, p. 12).

The rule at common law is that "the testimony of the prosecutrix or injured person, in the trial of all offenses against the chastity of women, was alone sufficient evidence to support a conviction, neither a second witness nor corroborating circumstances were necessary". 7 Wigmore, *Evidence* (3d ed. 1940) § 2061. The jury is entitled to believe her testimony, and convict; or disbelieve her, and acquit; and if a conviction is had, appellant will not be heard to complain that the testimony of prosecutrix was not corroborated. *Boddie v. State,* 52 Ala. 395 (1875) stated in 7 Wigmore, *id.,* p. 345.

Alaska has no statute changing this common law rule. § 66-13-61 A.C.L.A. 1949 requires corroboration only in cases of abduction of a female for prostitution or seduction under promise of marriage. There is no reported decision, to the knowledge of appellee, requiring corroboration of a rape-complainant in Alaska. It is submitted that such a requirement is grossly unfair in consent-under-age sex cases and would do more to pervert justice than to promote it. 7 Wigmore, *id.,* § 2061 pp. 354-5. The better procedure is to resort to scientific analysis of the prosecutrix's mentality in order to determine credibility, rather than rely upon a statutory rule of thumb. *Id.,* pp. 354-5; 3 *id.,* § 924(a); *Psychiatric Aid in Evaluating the Credibility of Rape Complainant,* 26 Ind. L.J. 98 (1950) set out in Appendix "A", *infra.*

An example of the injustice of the statutory corroboration rule is *State v. Elsen,* 187 P. 2d 976 (Ida. 1947) in which defendant, a 59 year old man, was convicted below of statutory rape of a 12 year old girl. The girl admitted consent to sexual intercourse with persons other than defendant. The Appellate Court held that she had impeached herself and since there was no other direct evidence of the crime, the conviction was reversed. The case shows that there was in fact sufficient evidence to support the conviction, although appellee agrees that the prosecution would have been strengthened if prosecutrix had been sustained by psychiatric testimony of her credibility following a full clinical examination.

Appellant cites *Kidwell v. U. S.,* 38 App. D.C. 566 (1912) and *Ewing v. U. S.,* 135 F. 2d 633 (1942), *cert. den.* 318 U.S. 776, *reh. den.* 318 U.S. 803 (1942) as stating the "federal rule", apparently unmindful of the fact that the Federal Courts in the District of Columbia are similar to those in Alaska in administering local law. But even the "District of Columbia" rule appears to be set out in the *Ewing* case as follows (p. 635):

> . . . corroboration, in the sense that there must be circumstances in proof which tend to support the prosecutrix' story, is required, and for the lack of it Kidwell's conviction for one offense was reversed.
>
> But to safeguard the defendant by requiring corroboration in this sense is one thing. To throw around him a wall of immunity requiring the testimony of an eye-witness or "direct evi-

> dence'' which is more than circumstantial, in support of the prosecutrix' story, is another . . .

The *Ewing* case and many other decisions which use the term ''corroboration'' apparently refer to nothing more than proof of the corpus delicti. It is submitted that, with the exception of the State of Idaho, a clear and convincing story by the rape complainant accompanied by circumstances which tend to support her testimony is sufficient to go to the jury and is sufficient to sustain a conviction on appeal. *State v. Davis,* 147 P. 2d 940 (Wash. 1944); *Peo. v. Crawford,* 141 Pac. 824 (Cal. App. 1914); *State v. Shults,* 85 P. 2d 591 (N.M. 1938); *Woolridge v. State,* 236 P. 2d 196 (Okla. Crim. 1953); *Crump v. State,* 257 P. 2d 1103 (Okla. Crim. 1953). The case of *People v. Burns,* 4 N.E. 2d 26 (Ill. 1936) is strikingly parallel to the case at bar. The prosecutrix, a 14 year old girl, testified that she had been having sexual intercourse with her uncle for 3 months. The rape charged in the indictment was based upon the uncorroborated testimony of prosecutrix, except to the extent that her brother testified he saw defendant and prosecutrix in defendant's car on the day specified. On appeal, held that prosecutrix' testimony was reasonable, fair and probable, and was abundantly corroborated by the facts and circumstances surrounding the case. The Court cited *People v. Peters,* 48 N.E. 2d 352 (Ill. 1943) in which case the same Court stated that it is well settled that the testimony of a prosecutrix uncorroborated by other wit-

nesses may be sufficient to justify a conviction if clear and convincing.

Appellee submits that the trial court is in the proper position to rule on proof of the corpus delicti, if "corroboration" means that. Of course, the trial court in this case was not presented with the corroboration issue because appellant did not move for a judgment of acquittal or for a new trial.

Appellee further submits that the question of persuasiveness of the prosecutrix ought to be exclusively for the jury.

Without going into a detailed rebuttal of the "facts" stated in appellant's brief (Argument III, pp. 36-44), appellee submits that the record does not support the brief on the facts.

Loretta Lindsey's testimony was clear and convincing, was not shaken one iota on cross-examination, was supported as to surrounding circumstances by nearly every witness in the case except appellant, was medically corroborated by Dr. Stagg who examined Loretta shortly after she complained to the authorities, was psychiatrically sustained by Dr. Anderson who examined her fully and observed her on many occasions over a long period of time, and the jury believed her.

Appellee submits that the conviction on the rape counts should be affirmed, and that appellant's argument on corroboration should be rejected as not sound in law and not supported by the facts in the record.

ARGUMENT IV.

IN VIEW OF THE DEFENDANT'S ADMISSION THAT THE "HOSTILITY" OF THE COMPLAINING WITNESS WAS GENERATED ONLY BY ACTS OF PARENTAL DISCIPLINE AND WAS NOT OF A CONTINUING NATURE, IT WAS NOT REVERSIBLE ERROR FOR THE TRIAL COURT IN ITS SOUND DISCRETION TO LIMIT THE SHOWING OF HOSTILITY TO A PERIOD OF 30 DAYS PRIOR TO THE INITIATION OF THE CHARGES.

The trial court was justified in limiting the showing of hostility to a period of 30 days prior to bringing the charges (R. 259). In view of the defendant's admission (R. 258) that Loretta didn't remain hostile after being disciplined, it would have been highly prejudicial to the Government's case and extremely degrading for the witness, to have all the occasions warranting discipline, paraded before the jury, when they were completely immaterial to the issues involved. These, as every one knows, are normal occurrences in the development of a child. But to allow the accumulated incidents of 5 years to be paraded before the jury in kaleidoscopic succession is unjust as well as completely immaterial.

The rule has been well stated in 58 Am. Jur. 383, § 707, and although found in a secondary source common sense compels its acceptance.

> . . . The fact that the hostility arose a considerable period prior to the date of the trial would appear to be no reason for the exclusion of the evidence if the hostility and prejudice had continued. But it would seem to be necessary to make it appear either that the hostility exists at the time of the trial, or that it arose so recently that it can be assumed to continue. . . .

[Rule applied in:

Blackman v. State, 102 So. 147 (Ala. 1924).]

[Rule stated in:

State v. Kenstler, 184 N.W. 259, 260 (S.D. 1921).]

The scope to be allowed in showing bias should be left to the sound discretion of the trial judge. 3 Wigmore, *Evidence,* (3d ed.) 504, § 950:

> . . . The inferences in the present sort of evidence is from conduct or language to feelings inspiring it; and the only question is whether from the conduct or language a palpable and more or less fixed hostility (to one party) or sympathy (for the other) is inferable. Such questions should be left largely to the discretion of the trial court.

In view of the defendant's own admission it can hardly be said that the 30 day limitation imposed by the Court was an abuse of discretion.

ARGUMENT V.

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN STRIKING THE BAD CHARACTER TESTIMONY WHEN, AS THE RECORD CLEARLY SHOWS, THE CHARACTER WITNESSES WERE NOT PROPERLY QUALIFIED TO GIVE TESTIMONY AS TO LORETTA LINDSEY'S REPUTATION IN THE COMMUNITY FOR TRUTH AND VERACITY.

Appellant contends it was reversible error for the Court to strike the testimony of the three character witnesses called to testify to Loretta Lindsey's bad reputation for truth and veracity (R. 351-369).

It is not enough that a character witness be acquainted with the witness sought to be impeached, *he must be properly qualified* to give reputation evidence. 3 Wigmore, *Evidence,* (3d ed.) 17, § 691:

> . . . When the character of a party or of a witness is to be evidenced by reputation the reputation must itself be proved by a witness qualified by an opportunity to obtain knowledge of it.

and where the witness fails to qualify the testimony elicited on direct examination is properly stricken. *Shewitz v. U. S.,* 293 F. 581 (6th Cir. 1923).

To be properly qualified the witness must know the general opinion in the community, and although it is not necessary that the witness have talked with a majority of the members of the community, he must at least have heard the "utterances" of a representative minority. 5 Wigmore, *Evidence,* (3d ed.) 484, § 1613.

What is a representative minority depends upon the facts and circumstances of each case. But it is generally held that conversations with one or two persons do not qualify the witness to testify concerning the reputation involved. *Commonwealth v. Rogers,* 136 Mass. 158 (1883); *State ex rel. Seeburger v. Pickett,* 210 N.W. 782 (Ia. 1926); Rule stated in *People v. Root,* 245 P. 2d 679, 638 (Cal. App. 1952); *Vickers v. People,* 73 Pac. 845, 846 (Colo. 1903); *City of South Bend v. Turner,* 71 N.E. 657 (Ind. 1904); cf: *Girch v. State,* 177 N.W. 798 (Neb. 1920) (Held; testimony properly admitted where witness had

talked with 15 or 20 people in a community of 200); Anno. 92 Am. St. Rep. 28.

Examining defendant's witnesses in the light of these qualifications we find that Orville C. Johnson talked to a number of people back in 1950 (R. 359) and that was apparently concerning some missing articles and the witness' reputation for honesty. The only recent conversation was with Mr. and Mrs. Baer (R. 359) and this too apparently concerned theft and not truth and veracity (R. 360).

The conversations in 1950 and 1951 were of course too remote particularly where the witness sought to be impeached was only 10 years old at the time. In *State v. Thomas*, 113 P. 2d 73 (Wash. 1941), it was held not an abuse of discretion to exclude, as too remote, evidence of 13 year old girl's tendency to lie which took place two years prior to trial. Also Mr. and Mrs. Baer are hardly representative of the city of Ketchikan. Therefore the testimony of Orville C. Johnson, long-time friend of the defendant (R. 360) was properly stricken as coming from a witness not properly qualified to speak on Loretta Lindsey's reputation for truth and veracity.

The same can be said of the witness Bill Tatsuda, he too was a long-time friend of the defendant (R. 362). He had only overheard a conversation between two people, *one of whom was the defendant* (R. 363). He also testified that he had heard her reputation discussed other times but he couldn't remember where or when (R. 363). Surely it was not an abuse of discretion to strike this testimony.

The testimony of Robert E. Baer is no better. He talked only to Mr. and Mrs. Cal Johnson and Larry Pawsey, the uncle of the complaining witness, and had overheard conversations about the case up at the V. F. W. Club (R. 367).

It is the belief of the appellee that the record clearly shows that the three character witnesses did not know Loretta Lindsey's reputation in the community for truth and veracity, that they therefore were not qualified to speak on this girl's reputation, and that the testimony was properly stricken as being not good reputation evidence.

The trial courts have a broad discretion in this area and should not be reversed except on a showing of clear abuse. *Michelson v. United States,* 335 U.S. 469, 480 (1948):

> . . . Both propriety and abuse of hearsay reputation testimony, on both sides, depends upon numerous and subtle considerations, difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will courts of appeal disturb rulings of trial courts on this subject.

ARGUMENT VI.

IT WAS NOT PREJUDICIAL MISCONDUCT ON THE PART OF THE UNITED STATES ATTORNEY TO ATTEMPT TO SHOW A SIMILAR OFFENSE WITH ANOTHER YOUNG GIRL AS EVIDENCE OF A COMMON CRIMINAL DESIGN OR LUSTFUL DISPOSITION, NOR WAS IT IMPROPER TO SEEK TO IMPEACH THE DEFENDANT BY QUESTIONING HIM ABOUT THIS PRIOR IMMORAL ACT, WHERE THE TRIAL COURT SUSTAINED DEFENDANT'S OBJECTIONS AND WHERE THE INTRODUCTION OF THIS EVIDENCE FOR EITHER PURPOSE IS RECOGNIZED IN MANY JURISDICTIONS.

On two occasions the United States Attorney sought to introduce evidence of a prior sexual offense committed on Florence Dalton, once on the Government's direct case as evidence of pattern, motive, intent, and common design (R. 145) and once on cross-examination to impeach the defendant (R. 370, 371). Each time Court sustained defense counsel's objections and each time no request was made to have the preliminary questions struck or disregarded. This same subject, the prior crime on Florence Dalton, cropped up once again inadvertently during the playing of the sodium pentothal interview recording (R. 395, 396). However, here the volume was immediately reduced so that the jury heard only the preliminary questions. The jury had twice before been exposed to these introductory questions so repetition neither added to, nor detracted from, their overall knowledge.

Concerning its use in the first instance (R. 145), there is a split of authority on the question whether the prosecution in a rape case may on its direct case introduce evidence of a similar crime committed by

the defendant on one other than the complaining witness. Admittedly the majority view is that in statutory rape cases, similar offenses with other girls are inadmissible, 167 A.L.R. 565, 588. However, a minority holds that this type of evidence is admissible, 167 A.L.R. 565, 590. For a discussion of this question see *Bracey v. United States,* 142 F. 2d 85, 88 (D.C. Cir. 1944), *cert. denied,* 322 U.S. 762 where the Court found it unnecessary to rule on the question but was of the opinion that the *better reasoned* cases were in favor of admission.

The foregoing discussion was entered into merely to show that there is significant authority for the admission of this type of evidence. Therefore in view of this divergence and the fact that the question has never been decided in the Territory of Alaska it was perfectly proper for the United States Attorney to offer this evidence for the Court's ruling. It was done in good faith and with some confidence that the Court might concur in the reasoning accepted by the minority of Courts.

Since the question was one of first impression in the Territory of Alaska it would not have been reversible error for the Court to have adopted the minority view on this matter and overruled defendant's objection. It follows therefore that if it would not have been error to admit the evidence, *a fortiori* its exclusion could not have been error.

The second claimed error was the attempt by the United States Attorney to elicit from defendant an

admission that he had committed a similar sexual offense on Florence Dalton. Here again there is ample authority for the asking of this type of question to impeach a witness. 3 Wigmore, *Evidence,* (3d ed.) 547-550, §§ 981, 982. The attitude of the Federal Courts is indicated by *Coulson v. U. S.,* 51 F. 2d 178, 181 (10th Cir. 1931):

> If the defendant takes the witness stand, a different rule comes into play. He steps out of his character as a defendant, for the moment and takes on the role of a witness, and as such becomes subject to cross-examination in the same manner and to the same extent as any other witness . . . questions asked on cross-examination for the purpose of impeachment should be confined to acts of conduct which reflect upon his integrity or truthfulness, or so "pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth" [citing cases].

Since there is a recognized form of impeachment the United States Attorney had every reason to believe that, subject to the trial court's discretion in this area, he could compel the defendant to answer. Merely because the Court had excluded the evidence earlier when offered under a different theory (R. 145), it did not mean that the evidence was inadmissible under any theory. Even at the time of excluding the evidence, the Court indicated it might possibly be admitted later (R. 146).

Thus since the United States Attorney had in both instances reasonable grounds for assuming the evidence could be admitted it was not improper for him to offer it, nor was it any more prejudicial to the defendant than any other instance where evidence is offered and excluded. To hold otherwise would force the United States Attorney to run the risk of committing reversible error everytime he sought to introduce evidence under a rule that had not been precisely defined by prior Alaskan divisions. The defendant was no more prejudiced by these abortive attempts to introduce evidence than Loretta Lindsey was by the introduction of improper reputation evidence (R. 350-369). Counsel's recourse in these instances is to have the evidence stricken from the record, request the Court to instruct the jury to disregard it and to rehabilitate his witness on re-direct examination.

What the jury was able to hear of this matter while the recording was being played (R. 395, 396) was merely harmless repetition of the same preliminary matter and certainly not of such a prejudicial nature as to require a reversal.

With regard to appellant's contention that it was error for the Government to bring out the other acts of misconduct between defendant and the prosecutrix, suffice it to say that it is well recognized if not universally held in sex cases that prior acts between the same parties may be introduced to show a disposition to commit the act. *Hodge v. U. S.*, 126 F. 2d 849 (D.C. Cir. 1942); 2 Wigmore, *Evidence* (3d ed.) 355-368, §§ 398, 399; 167 A.L.R. 565, 574:

In most jurisdictions it is recognized that in prosecution for statutory rape, or rape of a female under the age of consent or otherwise unable to consent, evidence is admissible which tends to show prior offenses of the same kind committed by the defendant with the prosecuting witness, such evidence being admitted in corroboration of the offense charged or to prove identity, and not to prove a separate offense.

ARGUMENT VII.

THE TRIAL COURT'S COMMENTS AT THE TIME OF RESERVING FOR LATER DECISION THE QUESTION OF THE ADMISSIBILITY OF THE RETRACTION STATEMENT, DID NOT CONSTITUTE REVERSIBLE ERROR WHEN VIEWED IN THE LIGHT OF THE FACTS AS THEN DISCLOSED, AND THE COURT'S CLEAR EXPLANATION OF ITS POSITION; PARTICULARLY WHEN THE RETRACTION STATEMENT WAS LATER ADMITTED IN EVIDENCE AS DEFENDANT'S EXHIBIT "B".

The trial court's comments were to the effect that although he was not intimating any actual coercion had been used, the circumstances were such that implied coercion.

For complete understanding, these comments must be reviewed in the light of the circumstances leading up to the making of the retraction statement.

Loretta Lindsey made a charge that her stepfather had over a period of five years taken sexual advantage of her presence in the Lindsey household. The story was told to a number of people outside the family and formal charges were filed on April 12, 1954. She was immediately taken out of the home

and, through the Welfare Department, placed in the Krepps' home in Wrangell, 80 air miles away. Thus, a young 14 year old girl is suddenly taken away from her family and friends in the community. Being suddenly uprooted had its effects on her. She missed the family, particularly the Lindsey children (R. 39), and this is confirmed by Defendant's Exhibit A. On August 24 she returned to Ketchikan and the next morning went straight to the Lindsey home, offering to drop the charges. Those are the undisputed facts which led up to the retraction statement.

To summarize, a 14 year old girl charges her stepfather with a despicable crime; she immediately is removed from her family and placed in the hands of strangers; she misses her adoptive mother, the Lindsey children, possibly even the defendant; and she longs to return to the family fold and community friends.

It is perfectly obvious, as it was to the Court, that here is a situation latent with psychological coercion. *Whether or not the original charges are true or false* is beside the point, to return to the family circle this young girl had *one* choice—retract—repudiate—the accusations made against the very man who controlled her readmission into the family. Her desire to be reunited with the family and the obvious step she had to take to attain that goal, regardless of the truth or falsity of the charges, were the circumstances that the Court had in mind when commenting on the admissibility of the retraction statement. It is not necessary to set out here all the comments made by the

Court on this matter. They are found on pages 193, 194, 196, 197 and 198 of the record. However, two are set out here for illustration (R. 197, 198):

> . . . The Court. It isn't so much—my ruling doesn't for a moment imply that there was any actual coercion or any psychological pressure or anything of the kind. My ruling involves the question of whether or not the circumstances and the relationship of these people were not such as to imply undue influence and coercion without anything having been said, but of course there is testimony here of the complaining witness that answers were suggested to her by the defendant.
>
> * * * * * * *
>
> The Court. Oh, that is not stating the situation here. The crucial thing here is the relationship between the parties and the undue influence that one had within his power to exercise over the other. That is the crucial question. You may call your next witness, or is there cross-examination?

It is appellee's contention that, in view of the coercion inherent in the situation, the trial court was justified in reserving the question of the admissibility of the retraction statement and also justified in making the explanatory comments that accompanied this ruling.

Any possible ambiguity resulting from the Court's comments was immediately dispelled by his repeated explanations of the position he was taking and the meaning he intended to convey. Not once but twice the Court made it emphatically clear that he was not implying that the *defendant had exercised any actual*

coercion or psychological pressure, but only that the circumstances and the relationship of the people were such as to imply undue influence (R. 194, 197).

Since the judge was justified in making these comments and since any possible taint the comments might have suggested was completely dissolved by the Court's clear explanation, the defendant could not possibly have been prejudiced by the trial court's statements. The situation here involved is a far cry from the extremes found in the cases of *Quercia v. U. S.,* 289 U.S. 466, and *Williams v. U. S.,* 93 F.2d 685, cited by appellant; and the comments made fall far short of abusing that broad discretion allowed a federal judge in commenting on the evidence.

ARGUMENT VIII.

THE TRIAL COURT DID NOT ERR IN EXCLUDING TESTIMONY OF APPELLANT THAT THERE WAS A FEELING OF HOSTILITY BY LORETTA LINDSEY TOWARD VICTORIA LINDSEY, AUNT BY BLOOD AND ADOPTIVE MOTHER OF LORETTA AND WIFE OF APPELLANT, WHEN THERE WAS NO FOUNDATION LAID FOR SUCH IMPEACHMENT AND WHEN THE RECORD CLEARLY SHOWS THAT NO HOSTILITY DID IN FACT EXIST.

On this appeal, appellant raises an objection which was not made to the trial court, viz., that it was reversible error to exclude appellant's testimony concerning hostility toward Victoria Lindsey on the part of Loretta Lindsey (Appellant's Brief pp. 13, 16 and Argument VII). This was offered to show a motive for fabricating the rape and sodomy charges against appellant. It is significant to note that no sufficient

foundation was laid for such hostility impeachment and that when Victoria Lindsey was on the stand no attempt was made to show acts of hostility referable to her. Appellant's references to the record at pages 211, 216, 217, 226 and 227 do not support his argument.

On the contrary, the record negates any feeling of hostility toward Victoria Lindsey (R. 35, 55, 87-90 and Defendant's Exhibit "A"). The only basis in the record for appellant's argument is in his own direct testimony when he testified that neither of the adopted children had any respect for their mother (R. 254-255). Appellant attempted to introduce a card, which was objected to as incomprehensible (R. 56-57), purporting to have been written by Loretta to the effect that she would always hate Victoria (R. 299). The Court ruled that it was immaterial (R. 299).

Appellant has cited no authority in support of his argument that exclusion of evidence of hostility toward Victoria was error. Appellee has found no such authority and contends that the trial court ruled correctly in excluding an attempted impeachment upon an immaterial collateral matter. It is respectfully urged that the trial court exercised a sound discretion and that the ruling should be upheld.

CONCLUSIONS.

1. There is no doubt today that psychiatric testimony is acceptable and admissible in evidence. The courts recognize that a psychiatrist is particularly well fitted

for evaluating the character and credibility of witnesses, especially if it is shown that the expert opinion is based upon a full clinical psychiatric examination. Since psychiatric testimony for impeachment or rehabilitation of an impeached witness is generally admissible today, it follows logically and necessarily that the jury be given the bases for such expert opinion in order to determine the weight to be given, if any, to the opinion itself.

In cases involving sex offenses against children under age who have consented to the acts, there is a greater need for psychiatric testimony and in this area the courts have shown the greatest liberality in admitting psychiatric testimony concerning the character and credibility of the defendant and witnesses. Combined with this growing trend, is the general trend of the law of evidence toward vesting more discretionary powers in the trial judge who is in intimate contact with the living drama of the trial and who has the opportunity to observe all the participants.

Moreover, in these consent-under-age sex cases, it is imperative to have the complaining witness thoroughly examined by a psychiatrist and a general physician in order to prevent the acquittal of a guilty man as well as to protect the innocent. The record in the case at bar clearly demonstrates how carefully Loretta Lindsey was examined by Dr. Anderson and Dr. Stagg. Without the medical testimony of Doctors Anderson and Stagg, the case would have been nothing more than Loretta's word against appel-

lant's. This would be true, appellee contends, in every case of sexual misconduct by an adult upon a child under his care and control, unless there was an eyewitness or an incriminating photograph available. The very secrecy and underhandedness of this kind of outrage demands the use of scientific testimony in the interest of social and moral justice for all.

It is significant to realize that a psychiatric examination, and the use of narcoanalysis itself, is likely to be more effective on a subject whose mentality is immature, as Dr. Anderson testified, because such a young subject could hardly deceive a skilled examiner.

Conceding the desirability of admitting, in the sound discretion of the trial court, psychiatric testimony for impeachment or rehabilitation of witnesses, it is only fair to permit the jury to evaluate the weight to be given to such expert testimony. Where a sodium pentothal interview forms a part of the foundation upon which the expert psychiatric opinion is based, the jury is entitled to know the results of the narcoanalytic interview. To deprive the jury of this opportunity is contrary to common sense, especially where the expert opinion is not based upon a hypothetical question. Appellee contends that the overwhelming weight of authority supports its contention that the recorded transcript of Loretta's drug-induced statements was admissible, in the trial court's discretion in this difficult consent-under-age sex case, to enable the jury to evaluate Dr. Anderson's psychiatric opinion of Loretta's good character and credi-

bility. The trial court did not abuse its discretion, and its ruling should therefore be affirmed.

2. The recording of the sodium pentothal interview was properly admitted into evidence as a prior consistent statement after Loretta Lindsey had been impeached by reading into evidence a prior inconsistent statement, by showing her hostility toward the defendant, and by insinuations that part of her story was a recent contrivance. It is recognized by most courts, particularly the federal courts, that under these circumstances a prior consistent statement may be introduced if there are sufficient safeguards guaranteeing its truthfulness. The safeguards employed by the prosecution, i.e., psychological tests, psychiatric examination, and finally sodium pentothal, are far better suited to preventing fabricated self-serving corroboration than those safeguards recognized as rendering other forms of hearsay admissible. Surely statements admitted as *res gestae,* dying declarations, declarations against interest, etc., are not as free of doubt as this statement elicited under sodium pentothal by a competent psychiatrist, after a complete clinical examination.

3. In Alaska, the common law of crimes is in effect unless changed or modified by statute. Section 65-1-3 ACLA 1949. At common law, no corroboration of a woman complainant in a sex case is required. The only statutory modification of this common law rule in Alaska is Section 66-13-61 ACLA 1949 which specifically requires corroboration in abduction and

seduction cases. It is clearly inferable that the Legislature did not intend to change the common law rule with regard to rape and sodomy.

Assuming, *arguendo,* that some corroboration is required, appellee submits that the record shows ample corroboratory evidence. The reported decisions in other jurisdictions strongly indicate that "corroboration", especially in consent-under-age sex cases, means nothing more than proof of the *corpus delicti,* which should be left to the discretion of the trial court, or the clarity and convincing power of the prosecutrix, which ought to be in the exclusive province of the jury.

4. It was not reversible error for the trial court to limit the showing of hostility to a period of 30 days preceding the charges. After the defendant's admission that Loretta's hostility was not of a continuing nature, the Court very properly limited the showing of hostility. There was no necessity to degrade and blacken this witness when the evidence sought to be obtained was, by the defendant's own admission, immaterial, and the Court properly so held.

5. The three character witnesses introduced by the defense were definitely not properly qualified to give reputation evidence, and their testimony was rightly stricken. The record indicated that the witnesses did not know Loretta's reputation for truth and veracity, had only talked with a handful of people, and most of this conversation concerned her reputation for honesty three to four years before the charges were brought.

6. In view of the split of authority on the admissibility of evidence of other offenses, the United States Attorney did not indulge in prejudicial misconduct in trying to introduce evidence of a prior sexual offense of appellant. The trial court, in its sound discretion, sustained appellant's objection. On cross-examination, it is proper to impeach by asking about a specific act of immoral conduct, but again the trial court, in its discretion, sustained appellant's objection. If the trial court had ruled in favor of the Government, there would be no basis for predicating error. *A fortiori* there could be no prejudicial error when the ruling favors appellant.

7. The trial court's comments made at the time of reserving for later decision the admissibility of the retraction statement, were fully justified by the circumstances and the relationship of the parties. Regardless of the true facts Loretta Lindsey had to repudiate her accusations to regain the family fold. The trial court had some doubt as to the voluntariness of a statement made under this terrific emotional strain, and rightfully stated the reason for his hesitancy. In view of the clear explanation of his meaning, no possible prejudice could have resulted to defendant. The Court's explanation of why it was reserving the question was only common courtesy to the parties and certainly not reversible error.

8. The trial court wisely and correctly excluded testimony of appellant concerning a supposed hostility of Loretta toward Victoria Lindsey. This was attempted impeachment on an immaterial collateral

matter, and lay within the discretion of the trial court. Moreover, a reading of the record plainly shows that there was no hostility in fact toward Victoria.

Therefore, the judgment and verdict below are sustained by ample and competent evidence in the record. The trial court committed no error and its judgment, appellee respectfully urges, should be affirmed.

Dated, Juneau, Alaska,
August 26, 1955.

Respectfully submitted,

THEODORE E. MUNSON,
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(Appendices Follow.)

Appendices.

Appendix "A"

NOTE, 26 INDIANA LAW JOURNAL 98-103 (1950), QUOTED IN FULL.

CRIMINAL LAW.

PSYCHIATRIC AID IN EVALUATING THE CREDIBILITY OF A PROSECUTING WITNESS CHARGING RAPE.

Unfortunately, in prosecutions for rape, evidence tending to corroborate the testimony of the prosecuting witness is often lacking. Where this situation exists, determination of guilt is dependent on the resolution of two contradictory statements, viz., the accusation of the prosecutrix, and disavowal by the defendant. Unlike most criminal prosecutions, where additional evidence is presented by witnesses and through physical manifestations of probability, this not infrequent situation has only these two antithetical ingredients. And while the individual temperament of each juror is an inescapable constituent of our criminal system, a lack of evidence corroborating the prosecutrix virtually erases the possibility of an objective approach in evaluating her credibility. When the morally reprehensible nature of the crime and the ease with which persons may be falsely accused of rape are considered, the full import of this problem becomes manifest. Certainly, every effort should be made to minimize this perplexity.[1]

[1]This patent weakness in the judicial process is forcibly demonstrated by a recent Indiana case in which the defendant was convicted of rape. The only evidence to establish the crime was the testimony of the prosecuting witness, who later specifically denied that defendant had committed the offense charged. Nevertheless, the judgment of the lower court dismissing the motion for new trial was affirmed by the Indiana Supreme Court. Yessen

Under these circumstances, the majority of states adhere to the common law rule that in a trial for rape the testimony of the female alone is sufficient to support a conviction.[2] Contrary to the logical in-

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v. State, 92 N.E.2d 621 (Ind. 1950) (Judges Gilkison and Emmert dissenting).

A second feature of this case (a commentary on legal method particularly correlated to Indiana practice) is presented by the summary treatment given it by the Indiana Supreme Court. The motion for new trial was supported by affidavits, one of which contained prosecutrix's denial that the crime had been committed. Arbitrarily invoking an archaic procedural requirement, the Supreme Court refused to consider these affidavits because they were not contained in a special bill of exceptions, showing that they had been introduced in evidence at the hearing on the motion. The court has long been careful to enforce the rule that affidavits filed with a motion for new trial are in the record on appeal only if incorporated into the record by a bill of exceptions. See, *e.g.*, Butler v. State, 223 Ind. 260, 60 N.E.2d 137 (1945); Alexander v. State, 203 Ind. 288, 164 N.E. 259 (1928); Kleespies v. State, 106 Ind. 383, 7 N.E. 186 (1886). This requirement assures the court that opposing counsel had opportunity to introduce counter-affidavits at the hearing on the motion. But meritorious questions involving a defendant's personal liberty should not be lightly ignored; and here was a situation in which defendant's conviction of a serious crime could be sustained only upon testimony expressly repudiated. Yet, this was not considered cognizable because a procedural rule had not been complied with. Certainly, the questionable wisdom of rigidly adhering to such a formalistic requirement does not offset this disastrous consequence. The best solution to this unfortunate situation would be adoption of the rule proposed by the Judicial Council of Indiana, wherein opposing counsel is given a period within which to file counter-affidavits after a motion for new trial has been filed; and which provides that affidavits filed shall be considered as evidence and shall not be introduced at the hearing on the motion. The latter provision is expressly designed to repudiate the existing Indiana rule. Report of The Judicial Council of Indiana 29 (1948).

[2]*E. g.*, People v. Murray, 91 Cal. App.2d 253, 204 P.2d 624 (1949); State v. Chuchelow, 131 Conn. 82, 37 A.2d 689 (1944); People v. Sciales, 345 Ill. 118, 177 N.E. 689 (1931); Abshire v. State, 199 Ind. 474, 158 N.E. 227 (1927); Commonwealth v. Bemis, 242 Mass. 582, 136 N.E. 597 (1922); Commonwealth v. Oyler, 130 Pa. Super. 405, 197 Atl. 508 (1938). See also 7 WIGMORE, EVIDENCE § 2061 (3d ed. 1940).

ference, this doctrine does not owe its origin to, nor does it have any especial significance because of, the particularly heinous nature of the crime. It is merely an example of the general absence in Anglo-American law of rules requiring a specific quantity of evidence.[3]

Recognizing the fact that severe injustice may ensue from a failure to require more substantial proof of guilt where rape is charged, several states insist that the prosecuting witness' accusations be substantiated.[4] On first impression this would seem highly desirable since the crime is usually committed under clandestine circumstances, making false accusations with appropriate detail relatively easy.[5] Moreover, the commission of the offense is so repugnant to the mores of society that the disposition of a defendant's

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[3]See 7 WIGMORE, EVIDENCE § 2032 *et seq.* (3d ed. 1940).

[4]Some jurisdictions have adopted this policy through legislative action. For instance, N.Y. Penal Law § 2013 recites that, "No conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported by other evidence." In others, the rule is a creature of judicial invention. "A judgment of conviction . . . based upon the testimony of the prosecutrix alone cannot be sustained . . . unless the circumstances surrounding the commission of the offense are clearly corroborative of her statements." State v. Hines, 43 Idaho 713, 715, 254 Pac. 217, 218 (1927).

[5]Often quoted is Lord Hale's classic statement, "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished . . . but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party, accused, tho never so innocent." IP.C. 633, 635 (1680). And in the eighteenth century Montesquieu, though bitterly condemning the "crime against nature," wrote, "As natural circumstance of this crime is secrecy, there are frequent instances of its having been punished by legislators upon the deposition of a child. This was opening a very wide door to calumny." 1 MONTESQUIEU, THE SPIRIT OF LAWS 203 (Pritchard's ed. 1906).

case is likely to be influenced more by prejudice inspired by aroused public emotion than by a considered view of the evidence.[6] The severity of the penalty[7] and the inevitable social ostracism further accentuate the need of adequately protecting the accused from conviction on false charges.

The serious nature of the crime makes it equally essential, however, that courts and legislatures do not require a method of proof which places an unreasonable burden upon the state. In many cases there will be circumstances surrounding the alleged commission of the offense, in a few instances even witnesses, to either verify or discredit the prosecutrix's testimony.[8]

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[6]In Roberts v. State, 106 Neb. 362, 365, 183 N.W. 555, 557 (1921), the court recalled that, "Public sentiment seems inclined to believe a man guilty of any illicit sexual offense he may be charged with. . . ."

[7]Conviction in North Carolina carries a mandatory death penalty. N.D. Gen. Stat. § 14-21 (1943). In several states death, or life imprisonment, may be imposed. See, *e.g.*, Ark. Stat. Ann. tit. 41, § 3403 (1947); Mass. Ann. Laws c. 265, §§ 22, 23 (1942); Mich. Comp. Laws § 750.520 (1948).

[8]In State v. Leavitt, 44 Idaho 739, 260 Pac. 164 (1927), the court found corroboration sufficient to sustain a conviction from evidence that prosecutrix was tearful upon complaint to her mother soon after the alleged rape; her body was bruised and scratched, her underclothing torn and stained, and her sexual organs lacerated; and her broken watch was found among trampled weeds at the location where the crime was allegedly committed. In Cascio v. State, 147 Neb. 1075, 25 N.W.2d 897 (1947), defendant admitted the act of intercourse, but the complaining witness was not corroborated in her denial of consent when there was no evidence of physical injury nor of torn clothing, and she admittedly made no effort to escape though she had opportunity to do so. But in Prokop v. State, 148 Neb. 582, 28 N.W.2d 200 (1947), where defendant admitted the intercourse and alleged consent, prosecutrix was corroborated by evidence that her back, eye, and wrists were bruised, her neck was discolored, and she was hysterical upon complaining to a doctor soon afterwards.

On such occasions a rule which unequivocally requires that the complainant be corroborated serves well its laudable purpose of protecting the accused, without unduly handicapping the state's efforts to punish, or otherwise deal with, sex offenders. But the situation is reversed when there is an absence of such corroboration and the prosecutor must ground his case solely on the recital of the complaining witness.[9] And while the surreptitious perpetration of the crime is significant when considering the danger of false accusation, it is of equal consequence when proving the corpus delicti. Thus, if the prosecuting attorney is unable to secure other evidence substantiating the complainant's testimony, the state is powerless to deal with defendants who are in fact guilty. In this area a general rule of corroboration would accordingly break down by protecting the culpable as well as the guiltless. The problem thereby evolved is that of formulating some method of proof which will not

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[9]In People v. Romano, 279 N.Y. 392, 18 N.E.2d 634 (1939), the court held that the other evidence necessary to corroborate the prosecutrix was lacking where she identified defendant as one of a group of men who allegedly assaulted her, and swore that he raped her when her powers of resistance had been beaten down in an effort to repulse the others. And in People v. Pandeline, 141 Misc. 241, 251 N.Y. Supp. 384 (1931), an indictment for rape was dismissed because corroboration of complainant's charge that she was raped by defendant in a taxi was entirely lacking.

There may be evidence other than the testimony of the prosecuting witness, but not of sufficient caliber to constitute corroboration. For instance, other evidence tending to show only that defendant had opportunity to commit the crime is generally held insufficient in those states where corroboration is required. State v. Bowker, 40 Idaho 74, 231 Pac. 706 (1924); Roberts v. State, 106 Neb. 362, 183 N.W. 555 (1921).

impede the state's efforts to deal with offenders, and yet be flexible enough to protect the innocent.

The need for flexibility is further accentuated by the fact that false accusations of sex offenses may be engendered by personality disturbances not discernible to a court or jury.[10] This renders a courtroom appraisal of the complainant's testimony virtually impossible. For despite the mental disorder, if that is present, the individual may have a highly intelligent and extremely convincing manner.[11] An adequate evaluation of her credibility can be made only after a diagnosis based upon a psychiatric inquiry into the physical, mental, and social history of the prosecutrix.[12] Thus, the opportunity of the court and jury to observe the demeanor of the witness is of little consequence.

The desideratum can be attained by giving the prosecuting attorney, in all cases where rape is charged, the right to petition the court for appointment of

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[10]See 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940), and the discussion of case histories reprinted there. See also HEALY, THE INDIVIDUAL DELINQUENT 729-752 (1915); Glueck, *The Forensic Phase of Litiguous Paranoia,* 5 J. CRIM. L. & CRIMINOLOGY 371 (1914).

[11]*Ibid.* Most mental illnesses produce little or no outward change in demeanor. HENDERSON & GILLESPIE, A TEXTBOOK OF PSYCHIATRY 101 (6th ed. 1947). Aschaffenburg, in *Psychiatry and Criminal Law,* 32 J. CRIM. L. & CRIMINOLOGY 3 (1941), recalls that, "For over thirty years I have found that even well educated people when shown around in my clinic asked me at the end of such a visit where the excited patients were kept. They never realized that the madman of their imagination was but a rare exception." See also OVERHOLZER & RICHMOND, HANDBOOK OF PSYCHIATRY 9-10, 30 (1947).

[12]See 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940), esp. the letters from Drs. W. F. Lorenz, Karl An Menninger, Otto Mönkemöller, and William A. White reprinted there.

qualified psychiatrists to examine the prosecuting witness.[13] This examination would be made before trial, and a report of the findings presented in evidence. Presumably, this psychiatric inquiry would be requested only on those occasions where strong corroborative evidence is not available.[14] As a means of insuring the prosecuting attorney's compliance with this procedure, the court would determine whether there is any evidence tending to substantially verify the complainant's testimony. And in those cases where the state introduces no evidence of corroborative rank, the court would be disposed to find the defendant not guilty.[15] This exercise of judicial discretion is justifiable when two decisive factors are recalled: False accusations of sex offenses *are* made by persons affected with personality disturbances, and these disorders usually are *not* discernible to laymen.[16] Hence, when the state offers no corroborating

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[13]Despite frequent attacks, the probative value of psychiatric examination is generally recognized. See notes 19, 20, and 21 *infra.*

[14]It is likewise presumed that where there is no corroborating evidence, and the psychiatric inquiry reveals that the complaint has no merit, the state would decline to press charges.

[15]If the cause were being heard before a jury, presumably the court would direct a verdict of acquittal. See note 16 *infra.*

[16]The tremendous significance of these two facts cannot be overemphasized, for they comprise the fundamental reason why a wholly subjective appraisal of prosecutrix's credibility by the court or jury is so likely to result in severe injustice, and why a substitute method of evaluation must be found in the realm of psychiatric investigation. Normally it is said to be an invasion of the province of the jury for the court to direct a verdict where the determination of an issue involves the weight of evidence or the credibility of witnesses. See, *e.g.,* State v. Torphy, 217 Ind. 383, 28 N.E.2d 70 (1940). Obviously, such a doctrine can have no application in the situation envisaged here.

evidence, and no psychiatric report, it would not be assumed that the witness is a normal individual, notwithstanding the persuasiveness of her testimony.[17] By this method the responsibility and the means of verifying the statements of the complaining witness are placed squarely upon the state.[18]

Courts have long admitted psychiatric evidence where sanity is an issue,[19] and although they have not always been so willing to receive evidence of lesser mental illness, the value of psychiatric diagnosis in

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[17]It is recognized that not every false accusation of rape has its inception in a disordered mind, that motivation may be supplied by a desire to gain revenge, to blackmail, to escape public disapprobation, or by other exigencies. Admittedly, the proposed reform suggests no panacea for this type of situation.

[18]The circumstances in Yessen v. State, 92 N.E.2d 621 (Ind. 1950), see note 1 *supra,* present a situation ideally suited to the application of the procedure suggested here. Prosecutrix was a twelve year old child, apparently possessing delinquent tendencies, who had been deserted by her natural parents and placed by the County Welfare Department in a strange home with a couple employed by the department to give her room and board and to send her to school. That she was from two to three years behind in school is indicated by the fact that she was in grade 4-B. At the trial, which resulted in defendant's conviction of rape, the state introduced no evidence tending to support her testimony that the crime had been committed. After the trial she retracted her statements. Under the recommended procedure the state would not have been permitted to rely so heavily on the testimony of prosecutrix, and the absence of corroborating evidence would have necessitated a request for psychiatric aid in evaluating her credibility. Certainly, the background of this girl and her behavior subsequent to the trial suggest the strong possibility that had such a course been followed, the doubtful conviction would never have occurred.

[19]3 WIGMORE, EVIDENCE § 932 (3d ed. 1940). Many state statutes and the Federal Rules of Criminal Procedure expressly authorize appointment of experts to examine a defendant whose sanity is questioned. Indiana, for instance, has made such appointments mandatory when the issue is raised. IND. STAT. ANN. § 9-1702 (Burns 1933).

the latter respect is by no means unrecognized.[20] Indeed, it is in dealing with sex offenses that the courts have been most liberal.[21] But a serious difficulty in effectively administering the recommended procedure is presented by the dearth of qualified psychiatrists available to conduct the examinations. A similar problem is currently being encountered in effectuating sexual psychopath statutes,[22] which require specialized

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[20]For example, during World War II the United States government discharged more than 500,000 soldiers for lesser psychiatric disorders. MENNINGER, PSYCHIATRY IN A TROUBLED WORLD 343 (1948). The Massachusetts Briggs Law requires routine psychiatric examination in all cases of capital offenses and of persons indicted for any other offense who are known to have been previously indicted more than once or to have been convicted of felony. MASS. ANN. LAWS c. 123, § 100A (1942). See also United States v. Hiss, 88 F. Supp. 559 (S.D. N.Y. 1950) (a psychiatrist was allowed to testify that one of the prosecution's witnesses was a psychopathic personality); Coffin v. Reichard, 148 F.2d 278 (6th Cir. 1945) (hospital records were admitted to show that appellant was a psychopathic personality); People v. Hudson, 341 Ill. 187, 173 N.E. 278 (1930) (expert testimony indicated that witness was a moron).

[21]Several courts have been willing to admit psychiatric evidence of mental disorders in sex complaints. Miller v. State, 49 Okla. Cr. 133, 295 Pac. 403 (1930) (evidence that complainant was a nymphomaniac and that the diseased condition of her mind would make her testimony unreliable); Rice v. State, 195 Wis. 181, 217 N.W. 697 (1928) (expert testimony indicating that prosecutrix was depraved mentally, and imagined things entirely beyond reality); People v. Cowles, 246 Mich. 429, 224 N.W. 387 (1929) (evidence that prosecutrix was a pathological liar, a nymphomaniac, and a sexual pervert); State v. Pryor, 74 Wash. 121, 132 Pac. 874 (1913) (evidence that prosecutrix was suffering from hysteria); Mell v. State, 133 Ark. 197, 202 S.W. 33 (1918) (evidence of a prosecuting witness' insanity); Jeffers v. State, 145 Ga. 74, 88 S.E. 571 (1916) (expert testimony that prosecutrix was "considerably below the average" in mental development).

[22]Indiana has recently enacted such a statute. IND. ACTS 1949, c. 124, p. 328, Note, 25 IND. L. J. 186 (1950).

examinations.[23] To cope with this situation, it has been suggested that official court clinics, staffed with specialists, be established in the larger cities and utilized by the surrounding areas.[24] Besides alleviating the difficulty experienced in administering those statutes, adoption of the proposal would provide immediate access to trained specialists when the prosecuting attorney requests a psychiatric inquiry into the background of a complaining witness charging rape. Furthermore, the facility with which an examination could be instituted would encourage the use of the clinic in all cases where the prosecutor doubts the strength of his corroborative evidence.

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[23]See Note, 25 IND. L. J. 186 n. 31 (1950).

[24]*Ibid.*, 40 J. CRIM. L. & CRIMINOLOGY 186 (1949).

Appendix "B"

DESSION
~~DECISION,~~ FREEDMAN, DONNELLY AND REDLICH, DRUG-INDUCED REVELATION AND CRIMINAL INVESTIGATION, 62 YALE LAW JOURNAL 315, 320-1, 327-8, 338-342 (1953). THE ORIGINAL PAGE NUMBERS HAVE BEEN RETAINED FOR CONVENIENCE. (Emphasis supplied.)

Forensic Aspects of Narcoanalysis

The preceding section has considered the medical aspects of narcoanalysis and has attempted to evaluate the technique in terms of present scientific knowledge. The courts make ever-increasing use of the results of scientific research and experience. But it is well established that before a scientific discovery or technique is entitled to judicial recognition it must have passed from the experimental to the demonstrative stage by gaining "general acceptance in the particular field in which it belongs." And, assuming judicial recognition of reliability, questions may arise as to limitations upon its use. This is particularly true of narcoanalysis: Not only is it necessary to consider the reliability of the results but several of the exclusionary rules of evidence obtrude and demand attention. But beyond that, the technique sharply raises pungent questions of law, science, policy, and professional ethics which spring from the constitutional privilege against self-incrimination and the statutory physician-patient privilege. And as a "brooding omnipresence" is the gradually emerging and increasingly challenging problem of the extent to which privacy shall be invaded as truth-extracting procedures of high reliability are developed.

From the standpoint of the criminologist, narcoanalysis has the following present and potential uses, which are listed here without the expression of any value judgment:

1. *As an adjunct useful to a qualified psychiatrist* who makes a *full* examination of personality structure for any one of the following purposes: [320]

(f) *Estimation of character whenever this is an issue, i.e.,* good character of an accused in respect of a given relevant trait *or good character of a witness for truth and veracity; . . .*

2. As a primary procedure, without an otherwise full examination of personality structure, when used by a qualified psychiatrist for any of the following purposes:

(a) *To test the veracity of any given material witness by way of corroboration, impeachment, or disqualification; . . .*

4. *As a sole procedure, e.g., when the transcript of statements made under narcoanalysis is offered in evidence as such for any of the foregoing purposes: . . .* [321]

Effect of Stipulation Upon Admissibility

Suppose that the defense and prosecution enter into a stipulation that the defendant shall undergo examination, including narcoanalysis, by a designated psychiatrist, and that the results shall be admitted in evidence without objection on the part of the party

adversely affected. The question of admissibility presented is similar to that which has arisen with respect to lie-detectors. The results of lie-detector tests have usually been admitted in civil cases by stipula- [327] tion,[35] and by the trial courts in a few criminal cases.[36] Very few cases have reached the appellate courts, and the results are inconclusive, although favoring admissibility.[37] The only case involving narcoanalysis is *Orange v. Commonwealth,*[38] a murder prosecution, in which the defendant sought to introduce the results of a test made pursuant to an agreement with the prosecuting attorney. The court held that the results were properly excluded since the agreement did not provide that the results of the test would be admissible in evidence. If the stipulation or agreement had so provided, the implication is that the court would have held them admissible.[39] In general, contracts to alter or waive established rules of evidence are valid

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[35]See Note, 30 MICH. B.J. 6 (Feb. 1951).

[36]Inbau, *Detection of Deception Technique Admitted as Evidence,* 26 J. CRIM. L. & CRIMINOLOGY 262 (1935); Note, 26 J. CRIM. L. & CRIMINOLOGY 758 (1935).

[37]People v. Houser, 85 Cal.App.2d 686, 193 P.2d 937 (1948) (properly admitted over defendant's objection); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947) (court implied that if there had been a stipulation the results would have been admissible); Le Fevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943) (excluded, but court failed to discuss the effect of the stipulation). The latter case is discussed in Note, [1943] WIS. L. REV. 430, 438, and in INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 92 n.14 (1948), both authors suggesting that the case is not controlling upon the stipulation question.

[38]191 Va. 423, 61 S.E.2d 267 (1950).

[39]*Id.* at 439, 61 S.E.2d at 274: "This test was made apparently on the motion of the defendant and her co-defendants, and agreed to by the Commonwealth's attorney, but with no agreement that the results should be given in evidence."

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[39]*Id.* at 439, 61 S.E.2d at 274: "This test was made apparently on the motion of the defendant and her co-defendants, and agreed to by the Commonwealth's attorney, but with no agreement that the results should be given in evidence."

and enforceable in the absence of fraud or coercion.[40] There seems to be no substantial reason why a stipulation for the admissibility of the results of narcoanalysis should not be upheld, providing that the accused had the advice of counsel at the time of stipulation and that the psychiatric examination was otherwise complete and the psychiatrist qualified. [328]

Material Witnesses

Judicial resort to psychiatric examination and other scientific procedures for testing the veracity of key material witnesses in order to avert miscarriages of justice in criminal proceedings offers intriguing possibilities.[80] It is elementary that a witness to be competent must have a minimal capacity to observe, recollect, and narrate. At the *voir dire* examination on the question of competency, the judge is not bound by the ordinary rules of evidence and has full discretion to use any available aids, such as mental and psychological tests.[81] The modern tendency is to permit a mentally disordered witness to testify at trial, leaving the defect in question to have whatever weight it deserves as discrediting his powers of observation, recollection, or communication.[82] This relaxation of competency requirements has increased the need for

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[40]Tracy, Handbook of the Law of Evidence 367 (1952); Note, *Contracts to Alter the Rules of Evidence*, 46 Harv. L. Rev. 138 (1932).

[80]See 3 Wigmore, Evidence §§ 931-5, 997-9 (3d ed. 1940).

[81]2 *id.* §§ 492-501; Hutchins & Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses*, 37 Yale L.J. 1017, 1019 (1928).

[82]3 Wigmore, Evidence §§ 501, 931 (3d ed. 1940).

psychiatric evaluation of a personality-disordered key witness. Judicial obstructionism has taken two different forms. First, some courts, applying the traditional methods of character impeachment, have limited evidence to the reputation of the witness as evidenced by community judgment[83] or, in a few jurisdictions, to particular instances of misconduct.[84] But these methods, which have no bearing on defective organic capacity or personality structure, should not limit the use of expert testimony in evaluating the testimony of a witness.[85] Second, other courts apply

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[83]*E.g., State v. Driver,* 88 W.Va. 479, 107 S.E. 189 (1921).

[84]3 WIGMORE, EVIDENCE § 979 (3d ed. 1940).

[85]*Id.* at § 931:

> "Since the theory of this evidence is that any defect of capacity, insufficient to exclude, and yet involving less than the normal testimonial capacity, should legitimately discredit the witness, carrying whatever weight it may have in a given case, the only proper limit upon such evidence would seem to be as follows: *Any trait importing in itself a defective power of observation* (at the time of the matter testified to), *or of recollection, or of communication,* is admissible, provided the power is substantially defective as judged by the average standard of mentality."

Consult also State v. Armstrong, 232 N.C. 727, 62 S.E.2d 50 (1950), where the only eye-witness to a killing was a girl who would have been described by a doctor who had tended her—had he been allowed to testify—as "a low-class moron, equivalent of a nine-year-old child." In holding it reversible error not to let the doctor so testify, Chief Justice Stacy said:

> "It is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution who testify against him. . . .
>
> "What could be more effective for the purpose than to impeach the mentality or the intellectual grasp of the witness? If his interest, bias, indelicate way of life, insobriety and general bad reputation in the community may be shown as bearing upon his unworthiness of belief, why not his imbecility, want of understanding, or moronic comprehension, which go more directly to the point? . . . That which may be shown indirectly may also be shown directly. The law favors

these restrictions only when expert diagnosis of the lesser mental illnesses is offered to discredit, but [338] admit evidence of extreme mental derangement verging on psychosis.[86] Contrariwise, many have come to realize that psychiatry can render valuable assistance in assessing the lesser mental disorders. Recognition has been most pronounced in sex offense cases where the courts have permitted psychiatrists to expose mental deficiencies, hysteria, and pathological lying in complaining witnesses.[87] And some courts permit evidence that a witness uses drugs either to show organic impairment of testimonial powers or a propensity to lie.[88] There is also the recent example of the hypothetical psychiatric testimony introduced by the defense to impeach the witness Chambers in the trial of Alger Hiss in the Southern District of New York. The psychiatrist was permitted to testify that in his opinion the witness was a psychopathic per-

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directness over indirectness; simplicity over complexity; brevity over prolixity; clarity over obscurity; substance over form. There is no virtue in the long phrase when a short one will do just as well. The court-room is not the home of redundancy or circumlocution. Conciseness is the keynote there."

Id. at 728-9, 62 S.E.2d at 51.

[86]2 WIGMORE, EVIDENCE § 932 (3d ed. 1940). And see State v. Driver, 88 W. Va. 479, 107 S.E. 189 (1921).

[87]See Comment, *Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases,* 39 J. CRIM. L. & CRIMINOLOGY 750 (1949); and Note, 26 IND. L.J. 98 (1950).

In 1938, the American Bar Association's Committee on the Improvement of the Law of Evidence recommended that "in all charges of sex offenses, the complaining witness be required to be examined before trial by competent psychiatrists for the purpose of ascertaining her probable credibility, the report to be presented in evidence." 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940).

[88]Note, 16 So. CALIF. L. REV. 333 (1943); 3 WIGMORE, EVIDENCE § 934 (3d ed. 1940).

sonality with "a tendency towards making false accusations."[89] [339]

Admittedly, the dividing line between truth and untruth is a shadowy one. It is debatable whether psychology and psychiatry have progressed to the point where they are able (with or without narcoanalysis) to establish the truth or falsity of testimony. A recent appraisal is as follows:

> "Admittedly, categorical opinions about the truth of evidence can be given only rarely. And in simple, uncomplicated situations little or no assistance could be expected. But with the more complex problems, which involve the uncontrolled fantasy formation and suggestibility of childhood, the suggestibility and unreliability of the intellectually defective and the demented, the hallucinations and delusions of the psychotic, the irresponsibility of the true psychopath, the confabulations of patients with organic brain disorders, and the unreliability of hysterics, real help could often be obtained."[90]

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[89] *See* United States v. Hiss, 88 F. Supp. 559, 560 (1950), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951) (District Judge Goddard, in discussing the problem of admissibility, said: "The existence of insanity or mental derangement is admissible for the purpose of discrediting a witness. Evidence of insanity is not merely for the judge on the preliminary question of competency but goes to the jury to affect credibility.")

See also Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1950).

For a perceptive and critical appraisal of the psychiatric testimony in the Hiss case, see Roche, *Truth Telling, Psychiatric Expert Testimony and the Impeachment of Witnesses*, 22 PA. BAR ASS'N Q. 140 (1951).

[90] GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 365 (1952).

And it may be added that here as well as when insanity is the issue, narcoanalysis accompanying a complete and thorough examination is an important and valuable diagnostic adjunct.

If a witness agrees to submit to narcoanalysis the problem for the court is about the same as that posed by a defense offer of a voluntary narcoanalytic experiment on the defendant. If the witness does not consent several difficulties arise. *The full potentialities of psychiatric evaluation can not be realized unless the diagnosis is based upon a full clinical examination.* Therefore, to provide juries or courts with maximum psychiatric assistance there should be a clinical examination by a court-appointed psychiatrist upon a reasonable showing that a key material witness may be suffering from a mental illness likely to affect his credibility. Do courts have this power? If the competency of a witness is attacked, the judge certainly has power to appoint psychiatrists to examine the witness. His authority to do so stems either from his inherent power to summon witnesses[91] or from statutes or rules confirming his authority to call experts.[92] The *voir dire* may thus serve as a pro-

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[91] 2 WIGMORE, EVIDENCE § 563 (3d ed. 1940).

[92] *Ibid.*, collecting and summarizing the statutes and court rules. Exercising these powers, trial judges have appointed psychiatrists to examine witnesses whose competency was questioned by opposing counsel. People v. Hudson, 341 Ill. 187, 173 N.E. 278 (1930); Commonwealth v. Koch, 305 Pa. 146, 157 Atl. 479 (1931). And in Goodwin v. State, 114 Wis. 318, 321, 90 N.W. 170, 171 (1902), the court stated that examination could be imposed as a condition precedent to testifying where the court is seriously doubtful of a witness' mental competency.

cedural device for obtaining a clinical diagnosis which will later be available for impeachment purposes.[93] But suppose the court finds a witness competent without clinical psychiatric examination; is there any way to get a clinical examination where impeachment is the objective? Although it is doubtful whether a court has power to order a psychiatric examination for impeachment purposes alone, the court may be willing to accomplish this result by invoking its power to determine competency, even though the witness [340] has taken the stand and even though the court remains convinced that the witness is competent.[94]

If a court can order clinical examination of a witness, can the witness be required, as part of the examination, to undergo narcoanalysis? This, of course, raises problems of self-incrimination and the physician-patient privilege which are substantially the same as those already discussed in connection with the compulsory examination of defendants.[95]

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[93]People v. Hudson, 341 Ill. 187, 173 N.E. 278 (1930), and note 87 *supra*.

[94]In State v. Palmer, 206 Minn. 185, 288 N.W. 160 (1939), psychiatric examination was allowed after the witness left the stand. The diagnosis based on this examination was then used to impeach the witness. *Contra:* Goodwin v. State, 114 Wis. 318, 90 N.W. 170 (1902).

There may be cases where a diagnosis is already available because the witness has had psychiatric treatment either privately or in a mental hospital or clinic. If narcoanalysis was a part of the diagnosis this should not prevent its use. Of course, the physician-patient privilege might prevent the use of such a diagnosis.

[95]To permit either party to compel all his opponent's witnesses to submit to narcoanalysis might well lead to intolerable confusion and delay unless the technique is developed, refined, and simplified far beyond present expectations. In State v. Cole, 354

Summary and Conclusion

Conducted under properly controlled conditions by a qualified psychiatrist with experience in its use, an interview in which the subject is partially under the influence of a drug (such as the barbiturates) may be a proper and *valuable auxiliary procedure* in a thorough diagnostic examination. The be- [341] havior manifested under drug influence varies with the physiological tolerance of the subject, his person-

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Mo. 181, 188 S.W.2d 43, *rehearing denied,* 189 S.W.2d 541 (1945), the defendant made a motion at the beginning of the trial for a court order requiring all witnesses in the case to be required to give their testimony while strapped to a lie-detector. In holding that the trial court properly denied the motion the Missouri Supreme Court stated:

> "In our opinion the day has not come when all the witnesses in a case can be subjected to such inquisitorial and deceptive tests (or to drugs like scopolamine, or to hypnotism) without their consent. Furthermore, such dramatics before the jury would distract them and impede the trial—this latter also because it is necessary for the inquisitor to ask both harmless, irrelevant and 'hot' questions in order to bring out the contrast in the witness' emotional responses. No doubt the lie-detector is useful in the investigation of crime, and may point to evidence which is competent; but it has no place in the court room." *Id.* at 193, 188 S.W.2d at 51.

If narcoanalytic techniques are developed to the stage where the results are reliable as "truth" there would be no necessity to test persons other than the principals. A test of them would usually provide a full and complete answer to the legal inquiry.

And in State v. Lowry, 163 Kan. 622, 627-8, 185 P.2d 147, 151 (1947), where the trial court had suggested that both the complaining witness and the defendant submit to a lie-detector, the Kansas Supreme Court indicated that it would be more reluctant to admit the test results on a witness than on a defendant:

> "Consider the situation in the instant case. Two men were involved. One was a defendant on trial. The other was merely a witness and under no such emotional strain. Can it be said that with such wholly different mental states existing, the tests would be equally fair? Must the jury be asked to consider and weigh such intangible and elusive elements?"

ality structure, his "set" or attitude at that time, and the immediate stimuli impinging upon him. Generally, relaxation is facilitated, verbalization is less inhibited, and there is freer expression of fact—as well as of fancy and suggestion. In some cases correct information may be withheld or distorted and, in others, erroneous data elicited through suggestion. Nevertheless, narcoanalysis when correctly used may enable the psychiatrist to probe more deeply and quickly into the psychological characteristics of the subject. For these reasons, the results should not be regarded by the psychiatrist as "truth" but simply as clinical data to be integrated with and interpreted in the light of what is known concerning the dynamics of the subject's conflictual anxieties, motivations, and behavioral tendencies.

Thus the bare results of an interview under the influence of drugs should not, standing alone, be considered a valid and reliable indicator of the facts. As a sole procedure, narcoanalysis is not sufficiently reliable. And where the drug-induced interview is a primary procedure and an otherwise full examination of the subject's personality structure is lacking, the results should not be considered: *narcoanalysis should only be used as an adjunctive or auxiliary technique.* On the other hand, when the subject has submitted voluntarily, after advice of counsel, to a thorough examination by a psychiatrist of his own choosing, the psychiatrist should be permitted to take the results of a drug-induced interview into account as data in forming an opinion about the subject's mental con-

dition and personality structure. *So limited, the results have acquired enough reliability in the field of medical psychology to be recognized as bases for an expert opinion. And where the subject has submitted voluntarily there is no question of self-incrimination or the physician-patient privilege, and the hearsay rule is inapplicable.* [342]

Appendix "C"

C. T. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, WEST PUBLISHING CO. (1954), § 175, pp. 373-375 (FOOTNOTES OMITTED).

175. Statements Made While under the Influence of Drugs or Hypnosis.

Another possible method by which the truthfulness of the story of a witness may be tested is the inducing of a mental state in which his normal power of "censorship" is removed, and in which it becomes difficult or impossible for him to suppress his thoughts or devise a falsehood.[1] That alcohol has an influence in this direction is attested by the old maxim, *in vino veritas.* A physician administering the "twilight sleep" drug, scopolamine, to a woman in childbirth discovered that at a certain stage of anaesthesia the subject answered questions with child-like honesty.[2] Similar effects are produced by the injection of barbiturates, such as sodium amytal and sodium pentothal, which were widely used in World War II in the treatment of mental strains and neuroses produced by combat conditions. All of these drugs have been extensively employed in the investigation of crime and in the securing of confessions, and in attempts to test the guilt or innocence of convicts. If the drug were administered without the consent of the subject, it seems clear that a confession so induced would be excluded as "involuntary."[3] If the subject consented to the use of the drug then the admissibility of the confession, it seems, would depend upon whether the judge found that he

had a reasonable capacity to understand and speak the truth when he confessed.[4]

It has been suggested that the best field of usefulness for the examination under narcosis is the clearing of innocent suspects.[5] Defendants so far have offered such drug-induced statements without avail.[6] Since this technique is even more clearly in the experimental stage than the lie-detector method, judicial notice of its validity could not be accorded. *If, however, a foundation should be laid by evidence of experts as to the validity of the method and as to its correct application in the particular instance so that in the opinion of the experts the power of conscious contriving was removed and the statements were not actuated by fantasy or suggestion*[7]—ever present dangers here—*such statements under voluntary narcosis could reasonably be admitted.* Even when offered by the party on his own behalf, the "hearsay" or "self-serving" objection need not prevail. *If the offering party has testified, the statement may be offered, not to prove the facts stated therein, but as a prior consistent statement to support his credibility, escaping the rule against such form of support by reason of the foundation showing the unique trustworthiness of this type of prior statement.* Or if the party has not testified, and the statement must come in as evidence of its truth, an exception to the hearsay rule on the ground of special trustworthiness could well be argued for. The further validation by experiment and practice, of the scientific theory of the trustworthiness of drug-induced statements, and the further de-

velopment of the skill of technicians in administering the method, will presumably be followed by the development of appropriate legal doctrines permitting the uses of such statements in evidence. (*Emphasis supplied.*)

There seems to be less scientific support for the reliability of declarations made under hypnotic influences than in the case of drug-induced statements.[8] The hypnotic subject is, of course, ultra-suggestible, and this fact manifestly endangers the reliability of statements made under hypnosis. Thus far, the courts have rejected confessions induced by hypnosis,[9] and statements made under hypnosis by the accused offered in his own behalf.[10]

Appendix "D"

TOPICAL ANALYSIS OF AUTHORITIES.

1. Those who label results of narcoanalysis or lie detectors as "self-serving" and exclude.

State v. Hudson, 289 S.W. 920 (Mo. 1926)
Orange v. Comm., 61 S.E.2d 267 (Va. 1950)
Peo. v. Cullen, 234 P.2d 1 (Sup.Ct.Cal. 1951) (but cf: Peo. v. Jones, 266 P.2d 38)
State v. Lindemuth, 243 P.2d 325 (N.M. 1952)

2. Those in which concept of self-incrimination and invasion of right of privacy and doctor-patient relation dominate.

State v. Cole, 188 S.W.2d 43 (Mo. 1945)
Despres, Legal Aspects of Drug-Induced Statements, 14 U. of Chi. L.R. 601 (1947)
Muehlberger, Interrogation Under Drug Influence, 42 J. Crim. L., Crim. and Pol. Sci. 513 (1951)

3. Those in which foundation for scientific evidence was lacking.

State v. Hudson, 289 S.W. 920 (Mo. 1926)
Orange v. Comm., 61 S.E.2d 267 (Va. 1950)

4. Those in which evidence of results of narcoanalysis or lie detector was offered as substantive evidence of guilt or innocence of defendant.

State v. Hudson, 289 S.W. 920 (Mo. 1926)
Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)
Orange v. Comm., 61 S.E.2d 267 (Va. 1950)
Henderson v. State, 230 P.2d 495 (Okla. Crim. App. 1951)

State v. Lindemuth, 243 P.2d 325 (N.M. 1952)
Peo. v. Jones, 266 P.2d 38 (Sup. Ct. Cal. 1954)

5. Those in which stipulation of parties would cure "unreliability" of the tests.

Orange v. Comm., 61 S.E.2d 267 (Va. 1950)
Peo. v. Houser, 193 P.2d 937 (Cal. App. 1948)
State v. Lowry, 185 P.2d 147 (Kans. 1947)
LeFevre v. State, 8 N.W.2d 288 (Wisc. 1943)

6. Those in which court regards tests as "self-serving" substantive evidence of innocence.

State v. Hudson, 289 S.W. 920 (Mo. 1926)
State v. Pusch, 46 N.W.2d 508 (N.D. 1950)
Orange v. Comm., 61 S.E.2d 267 (Va. 1950)
State v. Lindemuth, 243 P.2d 325 (N.M. 1952)
U. S. v. Bourchier, 5 USMCA 15, 17 CMR 15, 20-24 (Ct. of Mil. App. 1954)

7. Those in which court would hold that psychiatrist should be permitted to introduce results of narcoanalysis as part of expert psychiatric opinion of character.

Peo. v. Jones, 266 P.2d 38 (Sup. Ct. Cal. 1954)
Peo. v. Ford, 107 N.E.2d 595 (N.Y. 1952) (dissent)
U. S. v. Hiss, 88 F.Supp. 559 (S.D.N.Y. 1950)

8. Those which hold that refusal to admit evidence of narcoanalysis, if admissible, would not constitute error.

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)
Peo. v. Cullen, 234 P.2d 1 (Sup. Ct. Cal. 1951) (but cf: Peo. v. Jones, 266 P.2d 38)

9. Those who would admit results of narcoanalysis to show facts upon which expert psychiatric opinion is based.

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)
Peo. v. Ford, 107 N.E.2d 595 (N.Y. 1952)
Peo. v. Esposito, 39 N.E.2d 925 (N.Y. 1942)
Rule 409, Model Code of Evidence, ALI (1942)

10. Those which admit psychiatric evidence concerning credibility of a witness.

U. S. v. Hiss, 88 F.Supp. 559 (S.D.N.Y. 1950)
See also 3 Wigmore, Evidence (3d ed. 1940), §§ 924(a), 931, 932, 935, 997(b), 998(b)
Model Code of Evidence, ALI, Rules 106, 401, 409

11. Those which exclude results of narcoanalysis because of lack of precedent.

State v. Pusch, 46 N.W.2d 508 (N.D. 1950)
State v. Lindemuth, 243 P.2d 325 (N.M. 1952)

12. Those which permit comment that refusal to undergo narcoanalysis may be considered by a jury (cf: admission in State Courts of comment on failure of defendant to take stand)

Peo. v. Draper, 109 N.E.2d 342 (N.Y. 1952)

13. Those which indicate that admission of results of sodium pentothal would lie in sound discretion of trial court.

Peo. v. McCracken, 246 P.2d 913 (Cal. 1952)

14. Those in which results of narcoanalysis were not offered diligently or seasonably to the trial tribunal.

U. S. v. Bourchier, 5 USMCA 15, 17 CMR 15, 20-24 (Ct. of Mil. App. 1954)

15. Those in which transcript of defendant's statements made while under the influence of narcosis-producing drug clearly show self-contradictions and evasions to avoid incriminating details.

Orange v. Comm., 61 S.E.2d 267 (Va. 1950)

U. S. v. Bourchier, 5 USMCA 15, 17 CMR 15, 20-24 (Ct. of Mil. App. 1954)

16. Those which refuse to admit results of narcoanalysis as facts upon which expert based opinion because expert testified by means of the hypothetical question.

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)

17. Those which refuse admission of "lie detector" results offered as substantive evidence of innocence because not yet reliable enough.

Frye v. U. S., 293 Fed. 1013 (C.D. Cir. 1923)

18. Those which refuse admission of results of "lie detector" offered as substantive evidence of innocence because defendant refused to take the stand or submit to a similar test by the prosecution.

State v. Bohner, 246 N.W. 314 (Wisc. 1933)

19. Those which refuse to permit rehabilitation of an impeached prosecution witness by asking him

whether or not he had taken a "lie detector" case because defendant could not cross-examine "lie detector" machine.

Kaminski v. State, 63 So.2d 339 (Fla. 1953)
[Criticized in 6 Stanford L. Rev. 172 (1953)]

20. Narcoanalysis is analogous to blood tests, psychiatric examinations for insanity and medical examinations generally, the results of which are not used for testimonial purposes.

8 Wigmore, Evidence (3d ed. 1940) § 2265

21. Narcoanalysis and full clinical psychiatric examination of a complaining witness in a sex case ought to be the imperative duty of the prosecutor to have conducted and results offered in evidence.

3 Wigmore, Evidence (3d ed. 1940) §§ 466, 924 (a), 934(a)
C. T. McCormick, Handbook of Law of Evidence, West Pub. Co. (1954) § 45, p. 99

22. Psychiatrist should be permitted to testify as to relevant character trait of witness or accused, especially in sex cases.

Peo. v. Jones, 266 P.2d 38 (Sup. Ct. Cal. 1954)
Strand v. State, 252 Par. 1030 (Wyo. 1927)
U. S. v. Hiss, 88 F.Supp. 559 (S.D.N.Y. 1950)
3 Wigmore, Evidence (3d ed. 1940) §§ 934(a), 977 et seq.
Peo. v. Cowles, 224 N.W. 387 (Mich. 1929)
State v. Wesler, 59 A.2d 834
Miller v. State, 295 Pac. 403 (Okla. Crim. 1930)

Rice v. State, 217 N.W. 697 (Wisc. 1928)
cf: State v. Driver, 107 S.E. 189, 15 ALR 917 (W.Va. 1921)
59 Yale L. J. 1324, 1336-41 (1950)
Drug-Induced Revelation, 62 Yale L. J. 315 (1953)
Psychiatric Aid in Evaluating Credibility of Rape Complainant, 26 Indiana L. J. 98 (1950)

23. Psychiatric testimony concerning character of witness or accused for relevant trait does not usurp province of the jury because jury can reject either the expert opinion or the grounds upon which the expert opinion is based.

2 Wigmore, Evidence (3d ed. 1940) §§ 673, 680

24. Properly identified magnetic recordings are generally recognized as admissible in evidence.

State v. Spencer, 258 P.2d 1147, 1152 (Sup. Ct. Ida. 1953)
Peo. v. Stephens, 256 P.2d 1033 (Cal. App. 1953)
Ray v. State, 57 So.2d 469 (Miss. 1952)
State v. Perkins, 198 S.W.2d 704, 168 ALR 920 (Mo. 1946)
Annotation, 168 ALR 927
Williams v. State, 226 P.2d 989, 994 (Okla. Cr. 1951)
Wright v. State, 79 So.2d 66 (Ala. 1955)

25. The use of involuntary narcoanalysis, especially upon an accused in a criminal case, would violate

the privilege against self-incrimination and the right of personal privacy.

Despres, Legal Aspects of Drug-Induced Statements, 14 U. of Chi. L.R. 601 (1947)

Matthews, Narcoanalysis for Criminal Interrogation, included in LEGAL MEDICINE by R. B. H. Gradwohl, The C. V. Mosby Co., St. Louis (1954) pp. 945-976

Saher, Narcoanalysis, International Bar Association, London Conference (1950)

26. Appellate Court in passing on alleged error in instruction will not, since the new Federal Rules of Criminal Procedure, take a strained and hypertechnical view.

Patterson v. U. S., 192 F.2d 631, Cert. den. 343 U.S. 951

27. The jury is entitled to know the facts upon which an expert psychiatric opinion or any expert opinion is based, in order to have a foundation for properly evaluating the weight, if any, to be given to the opinion, and this is especially true when hypothetical question is not used.

People v. Ford, 107 N.E.2d 595 (N.Y. 1952)

People v. Esposito, 39 N.E.2d 925 (N.Y. 1942)

Lindsey v. U. S., 133 F.2d 368 (D.C. Cir. 1942)

Gendelman v. U. S., 191 F.2d 993 (9th Cir. 1951), cert. den. 342 U.S. 909

U. S. v. Petrone, 195 F.2d 334 (2d Cir. 1950)

State v. Linders, 224 S.W.2d 386, 389 (Sup. Ct. Mo. 1949)

Wyatt v. State, 57 S.E.2d 914 (Sup. Ct. Ga. 1950)

People v. Penny, 281 P.2d 337 (Cal.App. 1955)

Colvin v. State, 22 So.2d 544, 548 (Sup. Ct. Ala. 1945)

Thornton v. Birmingham, 35 So.2d 545, 7 ALR 2d 773 (Ala. 1948)

Walter v. State, 195 N.E. 268, 98 ALR 607 (Ind. 1935)

Peo. v. McNichol, 224 P.2d 21 (Cal. App. 1950)

3 Wigmore, Evidence (3d ed. 1940) §§ 445, 992, 977

2 Wigmore, id., § 675

7 Wigmore, id., § 1922

Appendix "E"

PARTIAL ANALYSIS OF APPELLANT'S AUTHORITIES.

1. *State v. Lindemuth,* 243 P.2d 325 (N.M. 1952). 1952).

Defendant was convicted of murder. Prior to trial, defendant made several confessions which were admissible in evidence. At the trial, on his direct case, defendant offered the testimony of a psychiatrist who would testify that he had given the defendant a sodium pentothal test and that defendant while under the influence of the drug stated substantially the same narrative as he testified to on the stand to the effect that he had not killed the deceased victim. The trial court rejected this testimony and on appeal the New Mexico Supreme Court held that it was not error to refuse to admit the psychiatrist's testimony.

The appellate court did not regard the psychiatric testimony as sufficiently reliable to be admitted for the purpose of proving defendant's innocence. It is noteworthy that there is no showing that defendant was given a full clinical psychiatric examination. On the contrary, it is clear that the sodium pentothal test was relied upon as a sole procedure unaccompanied by any tests or facts which would tend to corroborate the results.

2. *State v. Lowry,* 195 P.2d 147 (Kans. 1947).

In this case defendant and complaining witness took lie detector tests given by a police captain. The captain was qualified as an expert, and gave his

opinion, not as to credibility of the witnesses, but as to answers to specific questions and interpretations of these answers bearing directly on the substantive issue of defendant's guilt or innocence.

The conviction was reversed on the grounds that the lie detector became a substantive witness in absentia, hence not subject to cross-examination by defendant, and that the expert gave direct substantive testimony on the ultimate issue, i.e., guilt of defendant.

Since the "ultimate issue" or "invasion of province of the jury" doctrines have been thoroughly exploded by Wigmore in 7 Wigmore, *Evidence* (3d ed. 1940), Sections 1920, 1921, and abandoned by the Model Code of Evidence, ALI, Rule 401 (1942), opinion really holds that the Court is unwilling to accept as substantive evidence of guilt, the interpretations of a mechanical lie detector. Here the results of the lie detector test were offered testimonially as direct evidence of guilt, and not merely as data in support of an expert opinion concerning the credibility of the subjects.

3. *Curtis v. Rives,* 123 F.2d 936 (D.C. Cir. 1941).

This case was cited by appellant but does not appear to be in point. In this case, defendant in a habeas corpus proceeding asserted that the United States Attorney did not call at the trial certain witnesses who had testified before the grand jury and that this resulted in a denial in his right to be confronted by witnesses against him. The Court of Appeals rejected this contention as being unmeritorious.

The United States attorney can call who he wants to in elaborating the theory of his case, but he does not have to call every witness who testified before the grand jury. If the prosecution had suppressed or concealed evidence, the Court indicated that it would have taken a different view, but the record clearly refuted such an allegation.

4. *Delaney v. U. S.,* 263 U.S. 586 (1924).

This case was cited by appellant but does not appear to be in point. In this case, appellant objected to testimony given by one conspirator concerning what another conspirator, who was dead, had told him during the progress of the conspiracy. The Supreme Court held this to be admissible hearsay and stated that:

> ". . . it has been said that the extent to which evidence of that kind is admissible is much in the discretion of the trial judge. . . . We do not think that the discretion was abused in the present case . . ."

5. *U. S. v. Douglas,* 155 F.2d 894 (7th Cir. 1946).

This case also does not appear to be in point. In fact, if anything, it argues against the propriety of permitting Defendant's Exhibit "B" to go into the jury room as an exhibit.

In this case affidavits were attached to the information which contained proof of elements essential to conviction in order to persuade Court to grant leave to file the information. (This was the practice

before the Federal Rules of Criminal Procedure, 18 U.S.C.) These affidavits went to the jury room. One affidavit was made by a person called as a witness at the trial. The other was not. The Court of Appeals held that the introduction of these affidavits resulted in a deprivation of defendant's right to be confronted by the witnesses against him.

Appellant has overgeneralized the meaning of this case, just as he did *U. S. v. Sherman,* 171 F.2d 619 (2d Cir. 1948), because it is obvious that any evidence admissible as an exception to the hearsay rule would usually result in deprivation of confrontation. This would apply, for example, to use of prior inconsistent statements such as Defendant's Exihibt "B", as well as to prior consistent statements.

6. Appellant's statements concerning the article *Drug-Induced Revelation and Criminal Investigation,* 62 Yale L. J. 315 (1953), and his excerpts from that article are so conveniently overgeneralized and deftly taken out of context that appellee has included, as Appendix "B" of its brief, material taken from the article which approves of the use of narcoanalysis in the manner and for the purposes used in the case at bar.

7. Appellant's excerpts from McCormick, *Handbook of The Law of Evidence,* West Pub. Co. (1954), Section 175, page 374, is so unrepresentative of what Professor McCormick had to say about statements made while under the influence of drugs or hypnosis that appellee has quoted Section 175 in its entirety as Exhibit "C" of its brief.

8. Appellant has cited various annotations in American Law Reports, e.g., 60 ALR 1124 et seq., in support of his argument on corroboration of rape complainant; 140 ALR 21 et seq., in support of his argument against admissibility of prior consistent statement to rehabilitate an impeached witness; and 167 ALR 565 et seq., in support of his argument that attempt to show other similar offense was misconduct on part of United States attorney. In each of these annotations there was authority contra to the position urged by appellant, e.g., 60 ALR 1125 points out that corroboration of rape complainant is not required at common law or by majority of jurisdictions; 140 ALR 174 points out that prior consistent statements may be admissible to rehabilitate an impeached witness and in this area Courts have shown great liberality in sex cases in favor of such admission; 167 ALR 590 et seq. points out that other offenses may be brought out to show motive, identity, pattern or intent.